

***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-6063

United States Court of Appeals

For the Second Circuit

Docket No. 77-6063

ASSOCIATION OF NATIONAL ADVERTISERS, INC.

Plaintiff-Appellant,

against

FEDERAL TRADE COMMISSION,

CALVIN J. COLLIER, Chairman, PAUL RAND DIXON and
ELIZABETH HANFORD DOLE, Commissioners,

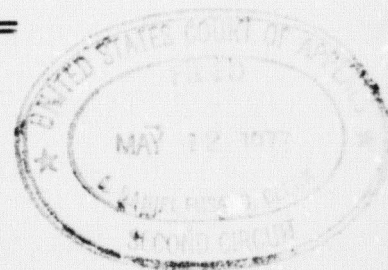
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

JOINT APPENDIX

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Attorneys for Plaintiff-Appellant
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New York, New York 10017
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Docket Entries

ASSOCIATION OF NATIONAL
ADVERTISERS, INC.

FEDERAL TRADE COMMISSION,
COULMER, CALVIN J., Chairman
DIXON, PAUL RAND and
DOLE, ELIZABETH HANFORD,
Commissioners,

4/15
Action for injunctive relief under 28 CAUSE
USC § §1331, 1337 AND 15 USC
§57a et seq.

ATTORNEYS

Weil, Guttman and Davis
60 East 42nd Street
New York, New York 10017
MU 7-8573

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JUL 23 1975	7364	

STATISTICAL CARDS

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JS-6	✓

-1-

DATE	NR.	PROCEEDINGS
07-23-76	1.	Filed complaint and issued summons. (appendix to complaint)
07-23-76	2.	Filed Pltff's Affidavit by Bruce R. Hafner.
07-23-76	3.	Filed Affidavit and Order appointing Bruce R. Hafner and Stephen A. Weitzman as process server. RAYMOND F. BURCHARDT, CLERK.
07-28-76	(4)	Filed summons and affdvt. of service by an individual- served the following: U.S. Atty. SDNY by Ralph Lee on 7-23-76 Atty General of U.S. by Ms. Dorothy Kluge on 7-26-76 U.S. Federal Trade Commission by Mrs. C. T. Anderson on 7-26-76 Commissioner Cahirman Alvin J. Collier by Robert S. White on 7-26-76 Commissioner Paul Dixon by Mrs. Joan Carroll on 7-26-76 Commissioner Elizabeth Sanford Hole by Mrs. Patricia Cohen on 7-26-76
08-20-76	(5)	Filed Pltff's Notice of Motion for an order for Temporary Relief. RET: 9-2-76.
08-20-76	(6)	Filed Pltff's Affidavit to supplement the affidavit of Bruce R. Hafner, Esq., etc. and in support of pltff's for relief pending final determination of action. by Gilbert H. Weil.
08-20-76	(7)	Filed Pltff's Memorandum in support of motion for temporary relief.
09-07-76	(8)	Filed Defts' Notice of Motion for an Order, dismissing the complaint, etc. RET: 9-10-76.
09-07-76	(9)	Filed Defts' Memorandum of Law in opposition to pltff's motion for temporary relief and in support of their motion to dismiss.
09-17-76	(10)	Filed Stip and Order that defts' motion pursuant to Rule 12(b) set for 9-10-76 is rescheduled for 9-20-76. So Ordered. CANNELLA, J
09-21-76	(11)	Filed Stip and Order extending extending time of pltffs to file memo in opposition to defts' motion to dismiss to 9-22-76 and defts' motion to dismiss together with pltff's previously filed motion for preliminary relief are ret. 9-29-76 and that pltff will seek <u>no</u> further extension of time to file its memo in opposition to defts' motion to dismiss. So Ordered. CANNELLA,
09-22-76	(12)	Filed pltffs memorandum in opposition to defts motion to dismiss....
10-08-76	(13)	Filed Defts' Reply Memorandum in support of motion to dismiss.
10-12-76	(14)	Filed pltff's sur-reply memorandum in opposition to motion to dismiss.
10-08-76	(15)	Filed stip & order extending defts' time to file their reply memorandum in opposition to motion for temporary relief and in support of their motion to dismiss to 10-06-76, etc.. as indicated. So ordered- CANNELLA, J.
02-14-77	(16)	Filed memorandum-decision.. for the reasons stated, pltff's motion for a preliminary injunction is denied, and the complaint is dismissed with prejudice. So ordered- CANNELLA, J. (m/n)
02-16-77	(17)	Filed Judgment-- that defts. have judgment against pltff. dismissing the complaint. Clerk (m/n)
03-31-77	(18)	Filed pltff's notice of appeal to USCA from the Order dated 2-14-77 and entered on 2-14-77. Copy to: U.S. Attorney. entered 4-1-77
04-05-77	(19)	Filed pltff's amended notice of appeal to USCA from each and every part of the Order dated 2-14-77 and entered on 2-14-77. Copy to: U.S. Atty. for SDNY. Ent. 4-5-77.
04-12-77		Filed plaintiff's 2nd amended notice of appeal from each and every part of the order entered February 14, 1977 and from the judgment entered February 16-77. Mailed notice to Robert R. Fiske, Jr. U.S. Atty., S.D.N.Y.

BEST COPY AVAILABLE

TRUE COPY

RAYMOND F. BURCHARDT, CLERK

By

M. J. Fiske

Judgment dismissing the complaint

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X
ASSOCIATION OF NATIONAL ADVERTISERS,
INC.

Plaintiff

: 76 Civil 3277

-against-

FEDERAL TRADE COMMISSION, CALVIN J.
COLLIER, Chairman, PAUL RAND DIXON
and ELIZABETH HANFORD DOLE

Defendants
----- X

: JUDGMENT

Plaintiff having moved the court for injunctive relief and defendants having moved pursuant to Rule 12(b), of the Federal Rules of Civil Procedure, and the said motions having come on to be heard before the Honorable John M. Cannella, United States District Judge, and the Court thereafter on February 14, 1977, having handed down its memorandum decision denying plaintiff's motion for injunctive relief, and granting defendants' motion to dismiss, it is,

ORDERED, ADJUDGED and DECREED: That defendants FEDERAL TRADE COMMISSION, CALVIN J. COLLIER, Chairman, PAUL RAND DIXON and ELIZABETH HANFORD DOLE have judgment against plaintiff ASSOCIATION OF NATIONAL ADVERTISERS, INC., dismissing the complaint.

Dated: New York, N. Y.
February 16, 1977

Raymond F. Berglund
Clerk

(17)

Memorandum decision and Order

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

ASSOCIATION OF NATIONAL ADVERTISERS,
INC.,

Plaintiff,

:
MEMORANDUM
DECISION

-against-

FEDERAL TRADE COMMISSION, CALVIN J.
COLLIER, Chairman, PAUL RAND DIXON
and ELIZABETH HANFORD DOLE,

Defendants.

:
76 Civ. 3277
(JMC)

-----X
CANNELLA, D.J.:

Plaintiff's motion for injunctive relief is hereby denied. Defendants' motion to dismiss the complaint is granted.

Plaintiff seeks temporary relief with respect to an ongoing rulemaking proceeding of the Federal Trade Commission ("FTC") in which plaintiff is participating as an "interested person." Plaintiff claims that, by creating a huge rulemaking record, the FTC is interfering with its right to adequately prepare for and participate in the rulemaking process, especially its right to cross-examine witnesses at FTC hearings. Based upon these contentions plaintiff seeks an order expunging certain allegedly irrelevant material from the administrative record, in order

to save plaintiff the time and expense of doing so itself. In that the FTC's refusal to excise the record is not "final agency action for which there is no other adequate remedy in a court," 5 U.S.C. § 704, this Court is without jurisdiction to review it at this time. See Coca-Cola Co. v. FTC, 475 F.2d 299 (5th Cir. 1973); Pepsico, Inc. v. FTC, 472 F.2d 179, 185-87 (2d Cir. 1972). Adequate review of the procedural rulings complained of may be had at the conclusion of the rulemaking process.

Accordingly, the motion for a preliminary injunction is denied, and the complaint is dismissed with prejudice.

SO ORDERED.

JOHN M. CANNELLA
United States District Judge

Dated: New York, N.Y.
February 11, 1977.

Summons and Complaint with
supporting exhibit

United States District Court

FOR THE

SOUTHERN DISTRICT OF NEW YORK

CIVIL ACTION FILE NO. _____

ASSOCIATION OF NATIONAL
ADVERTISERS, INC.,

Plaintiff,

v.

FEDERAL TRADE COMMISSION, CALVIN
J. COLLIER, Chairman, PAUL RAND
DIXON and ELIZABETH HANFORD DOLE,
Commissioners,

Defendants.

SUMMONS

To the above named Defendants :

You are hereby summoned and required to serve upon

WEIL, GUTTMAN & DAVIS

plaintiff's attorneys, whose address is

60 East 42nd Street
New York, New York 10017

an answer to the complaint which is herewith served upon you, within 60 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Clerk of Court._____
Deputy Clerk.

Date:

[Seal of Court]

NOTE:—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
ASSOCIATION OF NATIONAL
ADVERTISERS, INC.,

Plaintiff,

-against-

FEDERAL TRADE COMMISSION, CALVIN
J. COLLIER, Chairman, PAUL RAND
DIXON and ELIZABETH HANFORD DOL
Commissioners,

Defendants.
-----X

COMPLAINT FOR INJUNCTIVE RELIEF

Plaintiff, by its attorneys, Weil, Guttman & Davis,
complaining of defendants, alleges as follows:

FIRST: Plaintiff, Association of National Advertisers, Inc. (hereinafter sometimes referred to as "ANA"), is a Not-For-Profit Corporation organized, existing, and doing business under the laws of the State of New York, having its principal place of business at 155 East 44th Street, New York, New York 10017. ANA, founded in 1910, is composed of over 400 companies that utilize the advertising media to bring information about their products and services to the attention of consumers and the public. ANA's basic purposes are to represent its members' interests as buyers and users of national advertising and to safeguard and enhance the essential value of advertising as a vehicle for economic growth and well-being. Its membership is highly diversified.

A very high proportion of the largest users of advertising belong to it, but, nonetheless, approximately one-third of its membership invests more than one million dollars annually in advertising space and time. Included among ANA's members, are companies which manufacture and market food products and which advertise extensively to market and promote them. In brief, ANA's ranks contain virtually all industrial classifications that use national advertising, and companies which market to all segments of the population.

SECOND: Defendant, Federal Trade Commission (hereinafter sometimes referred to as the "Commission"), is an agency of the United States of America created pursuant to the Federal Trade Commission Act, 15 U.S.C. §41, et seq., having its principal office within the District of Columbia. The individual defendants are, and are sued herein as, Commissioners of the Federal Trade Commission, having offices in the Commission's offices in Washington, D. C.

THIRD: The jurisdiction of this Court to determine the within action is invoked under the Administrative Procedure Act, 5 U.S.C. §701, et seq. (APA), and the United States Judicial Code, 28 U.S.C. §§1331, 1337.

FOURTH: By publication of a notice in the Federal Register of May 28, 1975, at pages 23086, et seq., the Commission initiated a rulemaking proceeding ("the proceeding") under 15 U.S.C. §§57a(a)(1)(B) and 57a(b)-(d) to promulgate a Trade Regulation Rule ("TRR") to govern various practices in the advertising of food products.

FIFTH: National sales of food products by manufacturers and processors thereof are in excess of a hundred billion dollars per year, and the advertising of such products that would be affected by the Commission's proposed TRR exceeds \$2.5 billion.

SIXTH: Because leading and major food advertisers form an important segment of ANA's membership, it has filed a notification of interest in the rulemaking proceeding pursuant to 16 CFR §1.13(d)(3) [Appendix Item 3a], as well as written comments proposing issues for consideration pursuant to 16 CFR §1.13(b) [Appendix Item 3b]; and the Presiding Officer for the proceeding has notified ANA of his decision to designate it as one of the group representatives under 16 CFR §1.13(c)(1)(v).

SEVENTH: Under date of March 2, 1976, the Presiding Officer ("P.O.") for the proceeding issued a Final Notice Regarding Proposed Trade Regulation Rule, 41 Fed. Reg. 8980, et seq., pursuant to 16 CFR §§1.12 and 1.13(c)(1)(1) in which, among other things, he:

- a) divided the proceeding into three separate "phases";
- b) ruled that, for the present, hearings are to take place on only the first of said three phases;

- c) limited the subject matter of the said first phase to only certain specified sections and subsections of the proposed TRR, explicitly relegating the rest to a specified one of the remaining and deferred phases; and
- d) further delimited the scope of hearings within the first phase by designating, under 16 CFR §§1.12 and 1.13(c)(1)(1), the specific issues to be considered therein.

EIGHTH: Prior to the issuance of the Presiding Officer's Final Notice of March 2, 1976, over 15,000 pages of documents had been introduced into the public record of the proceeding, the vast bulk of which did not relate to the first phase of the hearings or its designated issues, and large quantities of which were not relevant to any part of the proposed TRR. In view thereof, ANA filed a petition with the Presiding Officer, a true copy of which is attached hereto as Appendix Item 4, to segregate so much of that public record as was germane to the first phase and to exclude the rest from the record of the first phase. The petition was denied in a ruling by the Presiding Officer, dated April 22, 1976, a true copy of which is attached hereto as Appendix Item 4A.

NINTH: Despite the express direction of the Commission as set forth in §8.7 of the Commission's Operating Manual -

The Commission has directed that, absent special circumstances warranting a different course, evidentiary material considered in connection with the formulation of proposed Trade Regulation Rules should be placed upon the public record in order to insure the fullest and most meaningful participation in the rulemaking proceeding by interested members of the public and those most likely to be affected by the rule. -

the Commission's staff, on or about April 28-30, 1976, put into the public record of the proceeding for the first time, with full knowledge of the limited scope of its first phase, approximately 25,000 pages of documents, vast amounts, if not most of which, are irrelevant to the first phase and its issues, and substantial numbers of which are not germane even to any other part of the proposed TRR.

TENTH: Although the said documents were technically put into the first phase record as of April 28-30, 1976, copies of them were not made available to ANA until on or about June 16, 1976, despite the requirements of 16 CFR §1.18(b) as to public availability thereof. Inasmuch as the first hearing in the first phase was scheduled to commence on July 12, 1976, ANA had filed a petition on or about June 11, 1976 with the Presiding Officer to postpone the hearings for a time adequate for it to prepare for them based upon such documents which, at that time, it had not even received. A true copy of said petition is attached hereto as Appendix Item 6. On or about June 16, 1976 the Presiding Officer denied the said petition in a ruling, of which a true copy is attached hereto as Appendix Item 7.

ELEVENTH: After ANA received copies of the documents referred to in paragraphs NINTH and TENTH above and had a short time to examine some of them superficially, and discovered that they vastly exceeded the bounds of the first phase, on or about June 25, 1976, it filed with the Presiding Officer a petition, a true copy of which is attached hereto as Appendix Item 8, which petition among other things:

- a) set forth the impropriety of the staff's actions and the prejudice to ANA therefrom, all of which is incorporated herein by reference as part of the within complaint;
- b) requested by way of remedy that the staff's belated and massive submission be expunged from the public record of the first phase, to be restored only upon a showing of reasonable relevance thereto;
- c) requested that all future submissions by any interested persons be placed in the public record of the first phase only upon a showing of reasonable relevance thereto;
- d) requested, because of the shortness of time, that if the Presiding Officer ruled adversely to ANA's petition he simultaneously certify his ruling for immediate review by the Commission in accordance with 16 CFR §1.13(c)(2)(1);

e) requested, because of the shortness of time, that the Presiding Officer stay, or postpone, the hearings until after ANA's petition had been finally ruled upon, lest its basis be rendered moot and ANA be thereby deprived of an adequate remedy.

TWELFTH: Under date of July 1, 1976 the Presiding Officer denied ANA's petition described in paragraph ELEVENTH above. A true copy of that ruling is attached hereto as Appendix Item 9.

THIRTEENTH: All rulings of the Presiding Officer referred to hereinabove are, pursuant to 16 CFR §1.13(c)(2)(1), final decisions at this time on behalf of the Commission and not subject to review by the Commission until its final review of the entire proceeding, by which time ANA will no longer have any adequate remedy for the wrongs herein alleged, and will have been irretrievably injured thereby.

WHEREFORE, plaintiff respectfully prays:

1. For a temporary order staying all hearings by the Federal Trade Commission in its trade regulation rulemaking proceeding for food advertising (Proposed 16 CFR, Part 437) until the within action has been finally determined.

2. For a final order that:

- A. The Federal Trade Commission expunge from the public record of its trade regulation rulemaking proceeding for food advertising all matters which its staff entered therein on or about April 28-30, 1976; and that
- B. The Federal Trade Commission henceforth permit to be entered into the said public record only such matters as are first shown to bear a reasonable relevance to one or more issues designated for hearing therein pursuant to its applicable rules or regulations.
- C. Such other and further relief, as the Court, under all the circumstances, may deem proper.

Dated: New York, New York
July 22, 1976

Respectfully submitted,
WEIL, GUTTMAN & DAVIS

By Bruce R. Hafner
Bruce R. Hafner
60 East 42nd Street
New York, New York 10017
(212) 687-8573

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

ASSOCIATION OF NATIONAL
ADVERTISERS, INC.,

Plaintiff,

-against-

FEDERAL TRADE COMMISSION,

Defendant.

-----X

APPENDIX TO COMPLAINT

Item 1

Inc., D.C.N.Y. 1974, 371 F.Supp. 37. N.Y. 1975, 516 F.2d 198. *Inc. Corp. Nat. Services, Inc., C.A.*

§ 57a. Unfair or deceptive acts or practices rulemaking proceedings—
Authority of Commission to prescribe rules and general statements of policy

(a) (1) The Commission may prescribe—

(A) interpretive rules and general statements of policy with respect to unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 45(a)(1) of this title), and

(B) rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 45(a)(1) of this title). Rules under this subparagraph may include requirements prescribed for the purpose of preventing such acts or practices.

(2) The Commission shall have no authority under this chapter, other than its authority under this section, to prescribe any rule with respect to unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 45(a)(1) of this title). The preceding sentence shall not affect any authority of the Commission to prescribe rules (including interpretive rules), and general statements of policy, with respect to unfair methods of competition in or affecting commerce.

Procedures applicable

(b) When prescribing a rule under subsection (a)(1)(B) of this section, the Commission shall proceed in accordance with section 553 of Title 5 (without regard to any reference in such section to sections 556 and 557 of such title), and shall also (1) publish a notice of proposed rulemaking stating with particularity the reason for the proposed rule; (2) allow interested persons to submit written data, views, and arguments, and make all such submissions publicly available; (3) provide an opportunity for an informal hearing in accordance with subsection (c) of this section; and (4) promulgate, if appropriate, a final rule based on the matter in the rulemaking record (as defined in subsection (e)(1) (B) of this section), together with a statement of basis and purpose.

Informal hearing procedure

(c) The Commission shall conduct any informal hearings required by subsection (b)(3) of this section in accordance with the following procedure:

(1) Subject to paragraph (2) of this subsection, an interested person is entitled—

(A) to present his position orally or by documentary submissions (or both), and

(B) if the Commission determines that there are disputed issues of material fact it is necessary to resolve, to present such rebuttal submissions and to conduct (or have conducted under paragraph (2)(B)) such cross-examination of persons as the Commission determines (i) to be appropriate, and (ii) to be required for a full and true disclosure with respect to such issues.

(2) The Commission may prescribe such rules and make such rulings concerning proceedings in such hearings as may tend to avoid unnecessary costs or delay. Such rules or rulings may include (A) imposition of reasonable time limits on each interested person's oral presentations, and (B) requirements that any cross-examination to which a person may be entitled under paragraph (1) be conducted by the Commission on behalf of that person in such manner as the Commission determines (i) to be appropriate, and (ii) to be required for a full and true disclosure with respect to disputed issues of material fact.

(3)(A) Except as provided in subparagraph (B), if a group of persons each of whom under paragraphs (1) and (2) would be entitled to conduct (or have conducted) cross-examination and who are determined by the Commission to have the same or similar interests in the proceeding cannot agree upon a single representative of such interests for purposes of cross-examination, the Commission may make rules and rulings (i) limiting the representation of such interest, for such purposes, and (ii) governing the manner in which such cross-examination shall be limited.

(B) When any person who is a member of a group with respect to which the Commission has made a determination under subparagraph (A) is unable to agree upon group representation with the other members of the group, then such person shall not be denied under the authority of subparagraph (A) the opportunity to conduct (or have conducted) cross-examination as to issues affecting his particular interests if (i) he satisfies the Commission that he has made a reasonable and good faith effort to reach agreement upon group representation with the other members of the group and (ii) the Commission determines that there are substantial and relevant issues which are not adequately presented by the group representative.

(4) A verbatim transcript shall be taken of any oral presentation, and cross-examination, in an informal hearing to which this subsection applies. Such transcript shall be available to the public.

Statement of basis and purpose accompanying rule; "Commission" defined; judicial review of amendment or repeal of rule; violation of rules

(d)(1) The Commission's statement of basis and purpose to accompany a rule promulgated under subsection (a)(1)(B) of this section shall include (A) a statement as to the prevalence of the acts or practices treated by the rule; (B) a statement as to the manner and context in which such acts or practices are unfair or deceptive; and (C) a statement as to the economic effect of the rule, taking into account the effect on small business and consumers.

(2)(A) The term "Commission" as used in this subsection and subsections (b) and (c) of this section includes any person authorized to act in behalf of the Commission in any part of the rulemaking proceeding.

(B) A substantive amendment to, or repeal of, a rule promulgated under subsection (a)(1)(B) of this section shall be prescribed, and subject to judicial review, in the same manner as a rule prescribed under such subsection. An exemption under subsection (g) of this section shall not be treated as an amendment or repeal of a rule.

(3) When any rule under subsection (a)(1)(B) of this section takes effect a subsequent violation thereof shall constitute an unfair or deceptive act or practice in violation of section 45(a)(1) of this title, unless the Commission otherwise expressly provides in such rule.

Judicial review; petition; jurisdiction and venue; rulemaking record; additional submissions and presentations; scope of review and relief; review by Supreme Court; additional remedies

(c)(1)(A) Not later than 60 days after a rule is promulgated under subsection (a)(1)(B) of this section by the Commission, any interested person (including a consumer or consumer organization) may file a petition, in the United States Court of Appeals for the District of Columbia circuit or for the circuit in which such person resides or has his principal place of business, for judicial review of such rule. Copies of the petition shall be forthwith transmitted by the clerk of the court to the Commission or other officer designated by it for that purpose. The provisions of section 2112 of Title 28 shall apply to the filing of the rulemaking record of proceedings on which the Commission based its rule and to the transfer of proceedings in the courts of appeals.

(B) For purposes of this section, the term "rulemaking record" means the rule, its statement of basis and purpose, the transcript required by subsection (c)(1) of this section, any written submissions, and any other information which the Commission considers relevant to such rule.

(2) If the petitioner or the Commission applies to the court for leave to make additional oral submissions or written presentations and shows to the satisfaction of the court that such submissions and presentations would be material and that there were reasonable grounds for the submissions and failure to make such submissions and presentations in the proceeding before the Commission, the court may order the Commission to provide additional opportunity to make such submissions and presentations. The Commission may modify or set aside its rule or make a new rule by reason of the additional submissions and presentations and shall file such modified or new rule, and the rule's statement of basis of purpose, with the return of such submissions and presentations. The court shall thereafter review such new or modified rule.

(3) Upon the filing of the petition under paragraph (1) of this subsection, the court shall have jurisdiction to review the rule in accordance with chapter 7 of Title 5 and to grant appropriate relief, including interim relief, as provided in such chapter. The court shall hold unlawful and set aside the rule on any ground specified in subparagraphs (A), (B), (C), or (D) of section 706(2) of Title 5 (taking due account of the rule of prejudicial error), or if—

(A) the court finds that the Commission's action is not supported by substantial evidence in the rulemaking record (as defined in paragraph (1)(B) of this subsection) taken as a whole, or

(B) the court finds that—

(i) a Commission determination under subsection (c) of this section that the petitioner is not entitled to conduct cross-examination or make rebuttal submissions, or

(ii) a Commission rule or ruling under subsection (c) of this section limiting the petitioner's cross-examination or rebuttal submissions,

has precluded disclosure of disputed material facts which was necessary for fair determination by the Commission of the rulemaking proceeding taken as a whole.

The term "evidence", as used in this paragraph, means any matter in the rulemaking record.

15 § 57a

COMMERCE AND TRADE

(4) The judgment of the court affirming or setting aside, in whole or in part, any such rule shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification, as provided in section 1254 of Title 28.

(5) (A) Remedies under the preceding paragraphs of this subsection are in addition to and not in lieu of any other remedies provided by law.

(B) The United States Courts of Appeal shall have exclusive jurisdiction of any action to obtain judicial review (other than in an enforcement proceeding) of a rule prescribed under subsection (a) (1) (B) of this section, if any district court of the United States would have had jurisdiction of such action but for this subparagraph. Any such action shall be brought in the United States Court of Appeals for the District of Columbia circuit, or for any circuit which includes a judicial district in which the action could have been brought but for this subparagraph.

(C) A determination, rule, or ruling of the Commission described in paragraph (3) (B), (1) or (11) may be reviewed only in a proceeding under this subsection and only in accordance with paragraph (3) (B). Section 706 (2) (E) of Title 5 shall not apply to any rule promulgated under subsection (a) (1) (B) of this section. The contents and adequacy of any statement required by subsection (b) (4) of this section shall not be subject to judicial review in any respect.

~~Bank unfair or deceptive acts or practices; promulgation of regulations by Board of Governors of Federal Reserve System; agency enforcement and compliance proceedings; effect of violations; power of other Federal agencies unaffected; reporting requirements~~

(1) (1) In order to prevent unfair or deceptive acts or practices in or affecting commerce (including acts or practices which are unfair or deceptive to consumers) by banks, each agency specified in paragraph (2) of this subsection shall establish a separate division of consumer affairs which shall receive and take appropriate action upon complaints with respect to such acts or practices by banks subject to its jurisdiction. The Board of Governors of the Federal Reserve System shall prescribe regulations to carry out the purposes of this section, including regulations defining with specificity such unfair or deceptive acts or practices, and containing requirements prescribed for the purpose of preventing such acts or practices. Whenever the Commission prescribes a rule under subsection (a) (1) (B) of this section, then within 60 days after such rule takes effect such Board shall promulgate substantially similar regulations prohibiting acts or practices of banks which are substantially similar to those prohibited by rules of the Commission and which impose substantially similar requirements, unless such Board finds that (A) such acts or practices of banks are not unfair or deceptive, or (B) that implementation of similar regulations with respect to banks would seriously conflict with essential monetary and payments systems policies of the Board, and publishes any such finding, and the reasons therefor, in the Federal Register.

(2) Compliance with regulations prescribed under this subsection shall be enforced under section 1818 of Title 12, in the case of—

(A) national banks and banks operating under the code of law for the District of Columbia, by the division of consumer affairs established by the Comptroller of the Currency;

(B) member banks of the Federal Reserve System (other than banks referred to in subparagraph (A)) by the division of consumer affairs established by the Board of Governors of the Federal Reserve System; and

(C) banks insured by the Federal Deposit Insurance Corporation (other than banks referred to in subparagraph (A) or (B)), by the division of consumer affairs established by the Board of Directors of the Federal Deposit Insurance Corporation.

(3) For the purpose of the exercise by any agency referred to in paragraph (2) of its powers under any Act referred to in that paragraph, a violation of any regulation prescribed under this subsection shall be deemed to be a violation of a requirement imposed under that Act. In

addition to its powers under any provision of law specifically referred to in paragraph (2), each of the agencies referred to in that paragraph may exercise, for the purpose of enforcing compliance with any regulation prescribed under this subsection, any other authority conferred on it by law.

(4) The authority of the Board of Governors of the Federal Reserve System to issue regulations under this subsection does not impair the authority of any other agency designated in this subsection to make rules respecting its own procedures in enforcing compliance with regulations prescribed under this subsection.

(5) Each agency exercising authority under this subsection shall transmit to the Congress not later than March 15 of each year a detailed report on its activities under this paragraph during the preceding calendar year.

Exemptions and stays from application of rules; procedures

(g)(1) Any person to whom a rule under subsection (a)(1)(B) of this section applies may petition the Commission for an exemption from such rule.

(2) If, on its own motion or on the basis of a petition under paragraph (1), the Commission finds that the application of a rule prescribed under subsection (a)(1)(B) of this section to any person or class of persons is not necessary to prevent the unfair or deceptive act or practice to which the rule relates, the Commission may exempt such person or class from all or part of such rule. Section 553 of Title 5 shall apply to action under this paragraph.

(3) Neither the pendency of a proceeding under this subsection respecting an exemption from a rule, nor the pendency of judicial proceedings to review the Commission's action or failure to act under this subsection, shall stay the applicability of such rule under subsection (a)(1)(B) of this section.

Compensation for attorney fees, expert witness fees, etc., incurred by persons in rulemaking proceedings; aggregate amount payable in any fiscal year

(h)(1) The Commission may, pursuant to rules prescribed by it, provide compensation for reasonable attorneys fees, expert witness fees, and other costs of participating in a rulemaking proceeding under this section to any person (A) who has, or represents, an interest (i) which would not otherwise be adequately represented in such proceeding, and (ii) representation of which is necessary for a fair determination of the rulemaking proceeding taken as a whole, and (B) who is unable effectively to participate in such proceeding because such person cannot afford to pay costs of making oral presentations, conducting cross-examination, and making rebuttal submissions in such proceeding.

(2) The aggregate amount of compensation paid under this subsection in any fiscal year to all persons who, in rulemaking proceedings in which they receive compensation, are persons who either (A) would be regulated by the proposed rule, or (B) represent persons who would be so regulated, may not exceed 25 percent of the aggregate amount paid as compensation under this subsection to all persons in such fiscal year.

(3) The aggregate amount of compensation paid to all persons in any fiscal year under this subsection may not exceed \$1,000,000.

Sept. 26, 1914, c. 311, § 18, as added Jan. 4, 1975, Pub.L. 93-637, Title II, § 202(a), 88 Stat. 2193.

¹ So in original.

Applicability of Unfair or Deceptive Acts or Practices, Rulemaking Procedures to Rules Classifying Corporations Promulgated Prior to January 4, 1975. Section 202(c) of Pub.L. 93-637 provided that:

"(1) The amendments made by subsections (a) and (b) of this section (adding section 57a of this title and amending section 46(g) of this title) shall not affect the validity of any rule which was promulgated under section 6(g) of the

Federal Trade Commission Act [section 46(g) of this title] prior to the date of enactment of this section [Jan. 4, 1975]. Any proposed rule under section 6(g) of such Act with respect to which presentation of data, views, and arguments was substantially completed before such date may be promulgated in the same manner and with the same validity as such rule could have been promulgated had this section not been enacted.

Item 2

**FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580**

16 CFR PART 437

FOOD ADVERTISING

Notice of Proceeding, Statement
of Reasons for Proposed Rule,
Invitation to Propose Issues of
Specific Fact for Consideration
in Public Hearings, Invitation
to Comment on Proposed Rule, and
Proposed Trade Regulation Rule

(The following has been reprinted from
the Federal Register of May 28, 1975 - 40 F. R. 23086)

FEDERAL TRADE COMMISSION

[16 CFR Part 437]

FOOD ADVERTISING

Proposed Trade Regulation Rule

Notice of proceeding, statement of reasons for proposed rule, invitation to propose issues of specific fact for consideration in public hearings, invitation to comment on proposed rule, and proposed trade regulation rule.

Notice is hereby given that the Federal Trade Commission, pursuant to the Federal Trade Commission Act, as amended, 15 U.S.C. 41, et seq., the provisions of Part I, Subpart B of the Commission's procedures and rules of practice, 16 CFR 1.7, et seq., and section 553 of Subchapter II, Chapter 5, Title 5, U.S. Code (Administrative Procedure) has initiated a proceeding for the promulgation of a Trade Regulation Rule on Food Adver-

tising. Previous notice of proposed rule-making was published in the *FEDERAL REGISTER* on November 11, 1974, 39 FR 39842, and included a proposed rule. The Commission republishes the proposed rule below following the invitation to comment.

In addition to the proposed rule, the Commission republishes for comment through incorporation by reference: (a) The "Explanation And Basis Of Proceeding"; (b) the "Analysis And Statement of Issues By Section" (as amended 40 FR 6375), including certain issues relating to affirmative disclosure in food advertising; (c) the "Staff Statement of Fact, Law and Policy" (not adopted by the Commission) and the issues raised thereby, including, in particular, the form which the disclosures called for in that statement should take; (d) the text of a staff proposal for achieving the affirmative disclosure of nutrition information in food advertising (which neither the Commission nor the Bureau Director nor the Assistant Director for National Advertising is presently prepared to propose as part of the rule); and (e) specific provisions recommended by staff, but not proposed by the Commission, for inclusion in those sections of the proposed Rule which have been reserved. All of the above-mentioned materials were originally published on November 11, 1974 (39 FR 39842 et seq.), and copies are available upon request to the Federal Trade Commission.

In addition to the questions raised in the aforementioned materials on which the Commission invites comment, the Commission also seeks comments evaluating the economic impact of the rule on small business.

STATEMENT OF REASONS FOR THE PROPOSED RULE

It is the Commission's purpose, in issuing this statement, to set forth its reasons for proposing this Trade Regulation Rule with sufficient particularity to allow informed comment. The precise format of such statements may vary from rule to rule depending on the complexity of the issues involved. For the purpose of assisting the Commission's deliberations on this proposed rule, the Commission has determined that meaningful comment by the public will be facilitated by presenting, in addition to the republished materials, a statement describing the basic factual premises underlying the Commission's determination to propose the rule.

The Commission's objective in these proceedings is to develop rules which will assure the accuracy of nutrition claims without restricting the amount of useful information an advertiser may present and to evaluate the staff statement calling for industry-wide disclosure requirements that will inform consumers of the nutritional worth of advertised foods.

The Commission emphasizes that neither the statement of factual premises nor the issues set out in the materials accompanying the proposed rule should be interpreted as a designation of disputed issues of specific fact. Such designations shall be made by the Commission or its duly authorized presiding official pursuant to the Commission's rules of practice.

nations shall be made by the Commission or its duly authorized presiding official pursuant to the Commission's rules of practice.

STATEMENT

In recent years, the Commission has been particularly concerned with problems surrounding the advertising of food products. This concern was initially sparked, in part, by findings of the 1969 White House Conference on Food, Nutrition and Health. The 1969 White House Conference Report emphasized that significant sectors of the American population were either malnourished or not well-fed due, in part, to the fact that they lacked the requisite knowledge to make rational determinations of their nutritional needs.

Since food is of central importance to a consumer's health and finances, it is important that food advertisers' claims respecting their products' nutritional value be scrupulously accurate. The Commission has reason to believe that some current food advertising contains nutrition claims that do not, in fact, accurately represent the nutritional worth of the advertised food or accurately describe particular nutrition characteristics being advertised.

The Commission has further reason to believe that the American consumer is being confronted with general advertising claims relating to the nutritional value of foods which have no commonly accepted or well-understood meanings and that definitions should be established so as to enable consumers to utilize these terms in making their food purchase decisions.

The Commission has determined that it has reason to believe the above statements on the basis of a staff review of food advertising which was aimed at identifying common food messages, analyzing the nutrition information they provide and identifying patterns of misleading nutrition claims. The staff's examination of food advertising has included consultations with experts from a variety of disciplines whose expertise bears upon the issues raised in this proposal. The Commission has not adopted any findings or conclusions of the staff. All findings in this proceeding shall be based solely on matter in the rulemaking record.

The Proposed Trade Regulation Rule on Food Advertising is designed to eliminate deception and unfairness which may result from the making of certain affirmative claims with respect to the nutritional value of foods. This proposed rule establishes uniform definitions for certain terms the use of which is subject to ambiguity and deception, and prohibits outright certain other claims the making of which is deceptive.

In addition, the staff of the Commission is of the view, for reasons described at length in its statement, that it is an unfair and deceptive act or practice under Section 5 for advertisers of food products to fail to disclose affirmatively certain information concerning the nutritive quality of advertised food products. The Commission is extremely con-

cerned about the considerations discussed in the staff statement, including the implications for food advertising raised by the Food and Drug Administration's nutrient labeling program. The Commission has therefore concluded that it is in the public interest to solicit comment on the staff statement, including, in particular, the form which the affirmative disclosures called for in that statement might take.

Furthermore, the Commission has for some years undertaken extensive adjudicative efforts in an attempt to remedy deceptive or unfair advertising by some food manufacturers. In past years the Commission has litigated many cases involving allegedly false or unfair advertising for foods and within the past four years has issued approximately twenty consent orders requiring food advertisers to cease and desist from the dissemination of certain misleading nutrition claims. The Commission, having reason to believe that adjudication alone is inadequate to establish well-defined legal standards for the guidance of consumers and food advertisers, undertakes herewith to define with specificity some acts or practices which may be unfair or deceptive and to prescribe requirements for the purpose of preventing such acts or practices.

INVITATION TO PROPOSE ISSUES OF SPECIFIC FACT FOR CONSIDERATION IN PUBLIC HEARINGS

All interested persons are hereby given notice of opportunity to propose any disputed issues of specific fact, in contrast to legislative fact, which are material and necessary to resolve. The Commission, or its duly authorized presiding official, shall, after reviewing submissions hereunder, identify any such issues in a Final Notice which will be published in the *FEDERAL REGISTER*. Such issues shall be considered in accordance with section 18(c) of the Federal Trade Commission Act as amended by Pub. L. 93-637, and rules promulgated thereunder. Proposals shall be accepted until not later than July 28, 1975, by the Special Assistant Director for Rulemaking, Federal Trade Commission, Washington, D.C. 20580. A proposal should be identified as a "Proposal Identifying Issues of Specific Fact—Food Advertising," and furnished, when feasible and not burdensome, in five copies.

INVITATION TO COMMENT ON THE PROPOSED RULE

All interested persons are hereby notified that they may also submit to the Special Assistant Director for Rulemaking, Federal Trade Commission, Washington, D.C. 20580, data, views or arguments on any issue of fact, law or policy which may have some bearing upon the proposed rule. Written comments other than proposals identifying issues of specific fact, will be accepted until ten (10) days before commencement of public hearings, but at least until July 28, 1975. The times and places of public hearings will be set forth in a later notice which will be published in the *FEDERAL REGISTER*.

PROPOSED RULES

To assure prompt consideration of a comment, it should be identified as a "Food Advertising Comment," and furnished, when feasible and not burdensome, in five copies.

Interested persons should also be advised that the Commission will consider all data, views, arguments or any other relevant information previously submitted on the public record in this matter since notice of publication in the *FEDERAL REGISTER* on November 11, 1974 (39 FR 39842 et seq.). Resubmission of previously filed data, views, arguments or other relevant information is not required.

In accordance with above, the Commission has proposed to amend Subchapter D, Trade Regulation Rules, Chapter I of 16 CFR by adding a new Part 437 to read as below.

Issued: May 23, 1975.

By direction of the Commission.

[SEAL] CHARLES A. TOBIN,
Secretary.

Sec.	
437.0	Preamble.
	Subpart A—General
437.1	Definitions.
437.2	Form, content and method of making disclosures.
	Subpart B—Voluntary Claims
437.3	Emphatic nutrition claims.
437.4	Nutrient comparison claims.
437.5	Nourishment claims.
437.6	Natural and organic food claims [Reserved].
437.7	Claims for foods intended to be combined with other foods.
437.8	Energy and calorie claims.
437.9	Fat, fatty acid and cholesterol content claims [Reserved].
437.10	Health and related claims [Reserved].

AUTHORITY: 38 Stat. 717, as amended; (15 U.S.C. 41-58).

§ 437.0 Preamble.

In connection with the advertising of foods in commerce, as "commerce" is defined in the Federal Trade Commission Act, for the purpose of inducing or which is likely to induce, directly or indirectly, the purchase of food, it is an unfair method of competition and an unfair or deceptive act or practice within the meaning of sections 5 and 12 of that Act to fail to comply with the following provisions of this Trade Regulation Rule:

Subpart A—General

§ 437.1 Definitions.

For the purpose of this rule the following definitions shall apply:

(a) "Advertisement" or "Advertising." Any written or verbal statement, illustration, or depiction, other than a label or in the labeling, which is designed to effect the sale of any food product, or to create interest in the purchase of such product, whether the same appears in a newspaper, magazine, leaflet, circular, mailer, book insert, catalog, sales promotional material, other periodical literature (except professional or scientific journals), billboard, public transit card, or in a radio or television broadcast or in any other media. It does not

include point-of-purchase advertising or any promotional material developed and/or disseminated by retail supermarket and food store establishments and wholesale food distributors the content of which refers solely to the price of an advertised food and which does not contain representations regarding nutrition, nourishment, or other nutrition claims relative to the product.

(b) "Food." Any article used for food or drink by humans, including chewing gum. However, it does not include:

(1) Special formula foods which are developed, intended or marketed exclusively for infants (persons not more than 12 months of age) and which provide the complete nutritional requirements of infants.

(2) Foods represented for use solely under medical supervision to meet nutritional requirements in specific medical conditions and advertised only in professional journals or publications.

(3) Alcoholic beverages subject to the provisions of the Federal Alcohol Administration Act of 1935 (27 U.S.C. section 201 et seq.).

(c) "Nutrients." Protein and those vitamins and minerals listed in 21 CFR 1.17(c) (7) (iv) and 21 CFR 125.1(b).

(d) "United States Recommended Daily Allowances" (U.S. RDA). The nutrients and levels established; subject to amendment, in 21 CFR 125.1.

(e) "Serving." That reasonable quantity of food suited for or practicable of consumption as part of a meal by an adult male engaged in light physical activity or by a child who is more than 12 months of age (when the food purports or is represented to be for consumption by any such child); or, if a nutrient label is affixed to the container of the advertised food, "serving" shall be the same measure as that which is stated on the label.

(f) "Portion." The amount of a food customarily used only as an ingredient in the preparation of a meal component or, if a nutrient label is affixed to the container of the advertised food, "portion" shall be the same measure as that which is stated on the label (e.g., $\frac{1}{2}$ cup of flour, $\frac{1}{2}$ tablespoon of cooking oil).

(g) "Clearly and Conspicuously Disclose." (1) Disclosing in a manner which can be easily understood (in the case of television and print advertising, also easily seen and read) by the casual observer, listener, or reader among members of the public and which conforms (except where otherwise provided in this rule), for advertising in any media, in all relevant respects to the Commission's Statement of Enforcement Policy of October 21, 1970. (See Vol. 2, CCH Trade Regulation Reporter section 7569.09.) Each disclosure shall be presented in the same language principally employed in the advertisement. (See Commission's Statement of Policy of July 24, 1973, as amended. 38 FR 21494-95.)

(2) In any television advertisement any disclosure of information shall be made in the manner and form prescribed by § 437.2(g).

(3) In any print advertisement any disclosure of information shall be made

in the manner and form prescribed by § 437.2(h).

(h) "Representation" or "Represent." Any direct or indirect statement, suggestion or implication in advertising, including but not limited to one which is made orally, in writing, pictorially, or by any other audio or visual means, or by any combination thereof.

(i) "Protein Efficiency Ratio" (PER). The protein efficiency ratio (PER) shall be determined in accordance with the method described in 21 CFR 1.17(c) (4).

§ 437.2 Form, content and method of making disclosures.

Any disclosure required or described by any provision of this rule shall be made in accordance with the following general provisions of this rule and as may be specifically prescribed in a section dealing with that particular disclosure.

(a) *Nutrients.* (1) Any advertisement which contains a representation concerning a nutrient or a disclosure of a nutrient shall make such representation or disclosure only from among the nutrients listed in 21 CFR 1.17(c) (7) (iv) and 21 CFR 125.1(b).

(2) A food shall not be represented in advertising as containing a nutrient, unless (i) the nutrient's (a) identity (stated as the common or usual name) and (b) amount (expressed as a percentage of the U.S. RDA contained in a stated serving of the advertised food) are clearly and conspicuously disclosed in accordance with all the provisions of this subpart of this rule, and unless (ii) a serving of such food contains the identified nutrient in an amount of 10 percent or more of the U.S. RDA; *Provided, however,* That, in instances where a food or a serving thereof is not required to contain a nutrient at a certain percentage of the U.S. RDA before a voluntary claim is made, an advertisement may represent the presence of nutrients contained in amounts of less than 10 percent of the U.S. RDA per serving if the identities of all nutrients required to be disclosed by 21 CFR 1.17 when a nutrition claim is made, as well as their respective percentages of the U.S. RDA per serving (including zero percent), are clearly and conspicuously disclosed in accordance with all of the provisions of this subpart of this rule. If a food or a serving thereof is required to contain any nutrient at a certain percentage of the U.S. RDA before a voluntary claim may be made (see Subpart B), the actual percentage (prior to any rounding off) of the U.S. RDA at which any such nutrient is contained in the advertised food or a serving thereof shall determine whether the condition(s) for making the claim has (have) been satisfied.

(3) An advertised food or a serving thereof may not be represented as containing a nutrient in an amount of 50 percent or more of the U.S. RDA, unless such food or serving contains the identified nutrient only in a naturally occurring (indigenous) form or such nutrient has been added in compliance with 21 CFR 1.17(a) (2).

(4) Disclosures of nutrients shall be expressed to the nearest two percent increment up to and including the 10 percent level; to the nearest five percent increment above the 10 percent level and up to and including the 50 percent level; and to the nearest 10 percent increment above the 50 percent level. If the percentage falls equidistant between the upper and lower increment in any percentage level, the disclosure shall be expressed as the lower increment.

(b) *Protein.* (1) The percentage of the U.S. RDA of protein present per serving of the advertised food shall be based on a U.S. RDA of 45 grams of protein, if the total protein has a PER equal to or greater than the PER of casein; or based on a U.S. RDA of 65 grams of protein, if the total protein has a PER less than that of casein.

(2) Except with respect to the amount of protein as permitted by the proviso in paragraph (a) (2) of this section, representations in advertising of the presence of protein may be made only if a serving of the advertised food contains protein at a level of 10 percent or more of the U.S. RDA and the total protein in the advertised food alone has a PER of 20 percent or more of the PER of casein.

(c) *Analytical methods.* The procedures and methods used for determining the amount of any nutrient contained in an advertised food shall be in accord with the provisions of 21 CFR 1.17 or, where applicable, 9 CFR.

(d) *Calories.* The energy content of a food shall be stated in calories per serving, expressed to the nearest two calorie increment up to and including 20 calories; to the nearest five calorie increment above 20 calories and up to and including 50 calories; and to the nearest 10 calorie increment above 50 calories. Calorie content shall be determined in the manner described in 21 CFR 1.17(c) (3).

(e) *Serving or portion.* Statements regarding servings or portions shall be consistently stated in terms of a convenient unit of such food or a convenient unit of measure that can be easily identified as an average or usual serving or portion and can be readily understood as such by purchasers of such food. Servings or portions may be expressed in terms of ounces, fluid ounces, tablespoonfuls, cupfuls, or other customary or usual units, and shall be consistent with the applicable provisions of 21 CFR 1.17. Provisions of this rule which refer to "servings" shall be construed to mean "portions" if the use of the latter term would be more appropriate with respect to a particular food or ingredient.

(f) *Identification and designation of foods.* A food shall be identified or designated in accordance with any applicable Federal regulations prescribed in the Code of Federal Regulations. Non-standardized foods shall be identified or designated by their respective common or usual names, if such exist, pursuant to 21 CFR Part 102.

(g) *Television advertisements—method and form of disclosures.* Under § 437.2 (a) and (b) and Subpart B of this rule, any disclosure in any television advertisement shall be made in the same portion (audio or video) of the advertisement in which the voluntary claim is made. The video portion of the disclosure in each advertisement shall be prominently displayed in the form of a super or title, or prominently displayed on the screen by itself so as to enable it to be completely and easily seen and read on all television sets, regardless of picture tube size, that are commonly available for purchase by the consuming public. Any disclosure required by Subpart B of this rule in any advertisement shall be made in immediate conjunction with the voluntary claim which creates the requirement for such disclosure.

(h) *Print advertisements—method and form of disclosures.* (1) Any disclosure in a print or display advertisement shall be prominently displayed in any sans serif type style consistent with the requirements set forth in § 437.1(g) (1) and hereinbelow, but in no event in condensed type. The type shall be set on a line at least one point larger than the point size of the type (not solid), using only normal word and letter spacing. A determination of whether a particular disclosure is "clear and conspicuous" within the definition set forth under § 437.1(g) (1) of this rule shall be made by examining the context of the total advertisement, but in no event shall a disclosure be deemed clear and conspicuous unless it appears in type of at least the following sizes, size being measured by the height of the smallest letter employed in making the disclosure:

(i) At least $\frac{1}{16}$ inch type, in advertisements of a trim size not larger than 65 square inches.

(ii) At least $\frac{1}{32}$ inch type, in advertisements of a trim size larger than 65 square inches, but not larger than 110 square inches.

(iii) At least $\frac{1}{8}$ inch type, in advertisements of a trim size larger than 110 square inches, but not larger than 180 square inches.

(iv) At least type of a size bearing the same proportion to the size of the advertisement as the proportion of $\frac{1}{8}$ inch to 180 square inches, in print advertisements of a trim size larger than 180 square inches.

(v) For any billboard or other display advertisement (except one which is located in the interior of a public transit vehicle) normally viewed and read from a distance substantially greater than the normal range of reading distances for a book, newspaper, magazine, or other similar printed reading matter:

(a) At least $\frac{1}{4}$ inch type in advertisements of a trim size larger than 180 square inches, but not larger than 270 square inches.

(b) At least $\frac{1}{2}$ inch type in advertisements of trim size larger than 270 square inches, but not larger than 1500 square inches.

(c) A size of one inch per 3000 square inches times the area of the advertisement expressed in square inches, (i.e., $\text{size} = (1 \text{ inch}/3000 \text{ square inches}) \times (\text{area of the advertisement in square inches})$), but in no event of a size less than $\frac{1}{2}$

inch, in advertisements of trim size larger than 1500 square inches.

(3) If a print advertisement appears on more than one page, and if the total area of the advertisement is greater than the area of the largest page upon which it appears, the required type size shall be determined as though the advertisement were of an area equal to the area of the largest page upon which it appears.

(3) In the case of advertisements that are in whole or part lighted or reflectively surfaced or advertisements otherwise prepared for enhanced visibility, any disclosure shall be lighted or otherwise treated in the same manner as the most prominently lighted or otherwise specially treated portion of the advertisement.

(4) For multi-sided displays and like advertising material, the required type size shall be determined as though the advertisement were of an area equal to the area of the major display area of the display, and any disclosure shall be prominently positioned upon such display area.

(5) For unusual advertising materials or materials too small to reasonably comply with the requirements of paragraphs (b) (1) through (4) of this section, the Commission may establish acceptable alternative forms of making the required disclosures. A petition formally requesting permission to utilize an alternative form of disclosure may be submitted to the Secretary for due consideration by the Commission.

Subpart B—Voluntary Claims

§ 437.3 Emphatic nutrition claims.

Emphatic, extraordinary, positive or similar claims concerning the nutritional value of a food with general or specific reference to any nutrient(s) contained in such food, including but not limited to the use of terms such as "lots (or 'full' of -----)", "high (or 'rich' in -----)", "packed (or 'loaded' with -----)", and "excellent (or 'significant' or 'good' source of -----)" shall not be used in advertising unless:

(a) The identity of any nutrient upon which the claim is based, as well as the percentage of the U.S. RDA per stated serving provided by each such identified nutrient, is clearly and conspicuously disclosed; and

(b) A serving of the advertised food contains each nutrient identified pursuant to paragraph (a) of this section in an amount of at least 35 percent of the U.S. RDA.

§ 437.4 Nutrient comparison claims.

(a) Representations in advertising which make a comparative claim for the amount of any nutrient contained in an advertised food shall not be made, unless:

(1) The comparison is with an equal-sized serving of a commercially available food; and

(2) If a serving of the advertised food contains the same number of calories as or fewer calories than an equal-sized serving of the compared food, the compared food contains no more than two nutrients in amounts greater by 10 per-

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cent or more of the U.S. RDA than the amounts (including zero percent) at which the same two nutrients are contained in a serving of the advertised food; and

(3) If a serving of the advertised food contains more calories than an equal-sized serving of the compared food, the compared food contains no more than two nutrients in amounts greater on a per 100 calorie basis than the amounts (including zero percent) at which the same two nutrients are contained in a serving of the advertised food; and

(4) If the comparison concerns protein, a serving of the advertised food contains protein of at least the same quality as that contained in an equal-sized serving of the compared food; and

(5) The identities of the advertised and compared foods are clearly and conspicuously disclosed; and

(6) The advertised food and the food with which it is compared normally serve the same purpose in the diet; and

(7) The same nutrients are compared and the name of each such compared nutrient is clearly and conspicuously disclosed; and

(8) The percentage of the U.S. RDA of each compared nutrient provided by a stated serving of the advertised food is clearly and conspicuously disclosed; and

(9) If an advertised food is represented as one which contains any nutrient in any amount greater than the amount of such nutrient in another food, the amount contained in a serving of the advertised food exceeds that contained in an equal-sized serving of the compared food by at least 10 percent of the U.S. RDA.

(b) A food shall not be represented in advertising to be a substitute or replacement for another food (unless it is a food labeled "imitation" in compliance with 21 CFR 1.8), or as nutritious as another food, unless:

(1) A serving of the advertised food contains at least the same nutrients as those nutrients contained in an amount of 2 percent or more of the U.S. RDA in an equal-sized serving of the compared food, and each such nutrient is present in the advertised food in an amount which is at least equivalent to the amount at which each is contained in an equal-sized serving of the compared food; and

(2) If the compared food contains protein, a serving of the advertised food contains protein of at least the same quality as that contained in an equal-sized serving of the compared food; and

(3) The identity of the compared food and number of calories provided by equal-sized, stated servings of the advertised and compared foods, respectively, is clearly and conspicuously disclosed; and

(4) If the advertised food contains a higher fat content than the compared food, such fact, as well as the total fat content (in accordance with 21 CFR § 1.17(c)(6) and 1.18(c)(2)(i)), is clearly and conspicuously disclosed; and

(5) If an advertisement is for a food labeled "imitation" in compliance with 21 CFR 1.8, it is clearly and conspicuously

disclosed that such food is not as nutritious as the food for which it is intended to be a substitute or replacement.

(c) A food shall not be represented in advertising to be nutritionally superior to another food, unless:

(1) The nutrients in a serving of the advertised food provide at least 10 percent more of the U.S. RDA than are provided by those nutrients contained in an amount of 2 percent or more of the U.S. RDA in an equal-sized serving of the compared food; and

(2) If the compared food contains protein, a serving of the advertised food contains protein of at least the same quality as that contained in an equal-sized serving of the compared food; and

(3) The identity of the compared food and number of calories provided by equal-sized, stated servings of the advertised and compared foods, respectively, is clearly and conspicuously disclosed; and

(4) If the advertised food contains a higher fat content than the compared food, such fact, as well as the total fat content (in accordance with 21 CFR 1.17(c)(6) and 1.18(c)(2)(i)), is clearly and conspicuously disclosed.

§ 437.5 Nourishment claims.

(a) An advertisement shall not represent a food to be "nourishing", "wholesome", "nutritious", or use any other term of similar import which in any way states, suggests or implies that such food is a valuable or significant source of nutrition, unless a serving of the food contains at least four nutrients, including protein, each of which is present in an amount of at least 10 percent of the U.S. RDA per 100 calories, and unless at least one of such nutrients is present in a serving of such food in an amount of at least 10 percent of the U.S. RDA; *Provided, however*, That such terms may be used to describe any identified nutrient(s) which is (are) contained in such food (e.g., "nutritious Vitamin C"), subject to the provisions of § 437.2(a)(2) of this rule.

(b) A food or a serving thereof shall not be represented in advertising as providing all of the nutrients necessary for a sound, complete or balanced diet, unless it satisfies the U.S. RDA requirements for protein, vitamins and minerals prescribed in 21 CFR Part 125, and unless competent and reliable scientific tests demonstrate that such food is a total diet replacement.

(c) Subject to the provisions of paragraph (b) of this section, an advertisement shall not represent that an advertised food or a serving thereof alone is "perfect" or "nutritionally perfect", provides "complete nutrition", contains "all the good things you need", or use any other term of similar import which in any way states, suggests or implies that consumption of only the advertised food will provide enough nutrition to constitute a sufficient and full source of nutrition; or that consumption of the advertised food or a serving thereof maintains health, makes an individual well-fed or in any way is a unique, spe-

cial or exclusive source of nutrition or health benefits.

(d) An advertisement shall not represent that a food or a serving thereof constitutes a nutritionally adequate meal, unless such advertised food or serving thereof complies with an applicable Federal regulation prescribed in the Code of Federal Regulations.

§ 437.6 Natural and organic food claims. [Reserved]

[See Explanation of Proceeding and Analysis and Statement of Issues by Section.]

§ 437.7 Claims for foods intended to be combined with other foods.

(a) If, in order to prepare a food for consumption, it is necessary for a consumer to add to an advertised food any other food(s), characterizing ingredient(s) or component(s), as such ingredient(s) or component(s) is (are) defined in 21 CFR 102.1, that fact shall be clearly and conspicuously disclosed in any advertisement for such food.

(b) An advertisement for a food described in paragraph (a) of this section may represent that consumption of a serving of the combination provides a designated percentage of the U.S. RDA of each of the nutrients contained in a serving of such combination, subject to the provisions of § 437.2(a)(2) of this rule. However, a representation that the advertised food alone provides a designated percentage of the U.S. RDA of the nutrients which are contained in a serving of such combination shall not be made.

(c) If a serving of the food(s), ingredient(s) or component(s) with which an advertised food is (are) necessarily combined contributes more than 50 percent of the U.S. RDA of any nutrient named in the advertisement, it shall be clearly and conspicuously disclosed that most of such nutrient is provided by such food(s), ingredient(s) or component(s).

(d) If an advertised food is frequently, but not necessarily, combined with any other food(s), ingredient(s) or component(s) for consumption, any representation regarding nutrition shall be based on the nutritional value of the advertised food alone.

§ 437.8 Energy and calorie claims.

(a) An advertisement shall not represent that a food or nutrient contains, produces, provides, enhances, or is a source of "energy" or "food energy", or use any other word, demonstration or depiction of similar import, unless it clearly and conspicuously discloses, in immediate conjunction with the making of each such representation, that "energy" or "food energy" is supplied by calories, as well as the number of calories contained in a stated serving of the advertised food.

(b) An advertisement shall not represent that consumption of a food or nutrient, by itself, will produce or provide health, general vigor, sustained energy or alertness, or that the energy from calories, by itself, will produce or provide strength, endurance, intellectual

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performance, or the prevention or relief of fatigue.

(c) An advertisement shall not represent that consumption of a food in any way enhances or contributes to a person's vigor, energy, alertness, strength or endurance, unless it clearly and conspicuously discloses, in immediate conjunction with the making of each such representation:

(1) That such vigor, energy, alertness, strength or endurance is enhanced by and depends, in part, upon the calories in the food; and

(2) The number of calories contained in a stated serving of the advertised food.

(d) An advertisement shall not represent that consumption of any food or meal is useful for, or contributes in any way to, or is useful in, regulating or maintaining caloric intake or body weight by the use of any demonstration or depiction, or any word or phrase such as "diet", "dietetic", "low calorie", "low in calories", "fewer calories", "calorie reduced", "contains artificial sweeteners", "artificially sweetened", or any other demonstration, depiction or term of similar import, unless:

(1) The advertised food complies with the provisions of 21 CFR 125.6; and

(2) The number of calories contained in a stated serving of the advertised food is clearly and conspicuously disclosed.

(e) An advertisement for a food which makes any representation described in paragraph (d) of this section, and which contains any artificial sweetener, except one which serves an authorized technological purpose (as defined in 21 CFR 125.1(b)) shall comply with the provisions of paragraphs (d)(1) and (2) of this section, and

(1) Shall clearly and conspicuously disclose the number of calories contained in a stated, equal-sized serving of the same food made with nutritive sweeteners; and

(2) If the artificially sweetened product contains a nutritive sweetener, the advertisement shall clearly and conspicuously make the following specific disclosure:

This food contains sugars and should not be used by diabetics without the advice of a physician.

(f) An advertisement shall not represent that a food is "sugarless", "sugar free", "contains no sugar" or use any other term of similar import, unless such food contains no sugars, including, but

not limited to, sorbitol, mannitol, or other hexitol(s).

§ 437.9 Fat, fatty acid and cholesterol content claims. [Reserved]

[See Explanation of Proceeding and Analysis and Statement of Issues by Section.]

§ 437.10 Health and related claims. [Reserved]

[See Explanation of Proceeding and Analysis and Statement of Issues by Section.]

[FR Doc.75-13680 Filed 5-27-75; 8:45 am]

Item 2a

FEDERAL TRADE COMMISSION

[16 CFR Part 437]

FOOD ADVERTISING

Proposed Trade Regulation Rule; Explanation of Proceeding and Analysis; Statement of Issues; Opportunity to Submit Data, Views or Arguments

Notice is hereby given that the Federal Trade Commission, pursuant to the Federal Trade Commission Act, as amended, 15 U.S.C. section 41 et seq., the provisions of Part 1, Subpart B of the Commission's Procedures and Rules of Practice, 16 CFR 1.11 et seq., and section 553 of Subchapter II, Chapter 5, U.S. Code (Administrative Procedure) has initiated a proceeding for the promulgation of a Trade Regulation Rule concerning food advertising. In so doing, the Commission will entertain the written and oral presentation of data, views or arguments with respect to the provisions of and issues relating to the proposed rule, and with respect to issues relating to the proposal of further rule provisions requiring affirmative disclosures in food advertising.

In accordance with the above notice the Commission proposes to amend Subchapter D, Trade Regulation Rules, of 16 CFR Chapter I by adding a new Part 437 to read as follows:

Sec.

437.0 Preamble.

Subpart A—General

437.1 Definitions.

437.2 Form, content and method of making disclosures.

Subpart B—Voluntary Claims

437.3 Emphatic nutrition claims.

437.4 Nutrient comparison claims.

437.5 Nourishment claims.

437.6 Natural and organic food claims [Reserved].

437.7 Claims for foods intended to be combined with other foods.

437.8 Energy and calorie claims.

437.9 Fat, fatty acid and cholesterol content claims [Reserved].

437.10 Health and related claims [Reserved].

AUTHORITY: 38 Stat. 717, as amended; (15 U.S.C. 41-58).

§ 437.0 Preamble.

In connection with the advertising of foods in commerce, as "commerce" is defined in the Federal Trade Commission Act, for the purpose of inducing or which is likely to induce, directly or indirectly, the purchase of food, it is an unfair method of competition and an unfair or deceptive act or practice within the meaning of sections 5 and 12 of that Act to fail to comply with the following provisions of this Trade Regulation Rule:

Subpart A—General

§ 437.1 Definitions.

For the purpose of this rule the following definitions shall apply:

(a) "Advertisement" or "Advertising". Any written or verbal statement, illustration, or depiction, other than a label or in the labeling, which is designed to effect the sale of any food product, or to create interest in the purchase of such product, whether the same appears

in a newspaper, magazine, leaflet, circular, mailer, book insert, catalog, sales promotional material, other periodical literature (except professional or scientific journals), billboard, public transit card, or in a radio or television broadcast or in any other media. It does not include point-of-purchase advertising or any promotional material developed and/or disseminated by retail supermarket and food store establishments and wholesale food distributors the content of which refers solely to the price of an advertised food and which does not contain representations regarding nutrition, nourishment, or other nutrition claims relative to the product.

(b) "Food". Any article used for food or drink by humans, including chewing gum. However, it does not include:

(1) Special formula foods which are developed, intended or marketed exclusively for infants (persons not more than 12 months of age) and which provide the complete nutritional requirements of infants.

(2) Foods represented for use solely under medical supervision to meet nutritional requirements in specific medical conditions and advertised only in professional journals or publications.

(3) Alcoholic beverages subject to the provisions of the Federal Alcohol Administration Act of 1935 (27 U.S.C. section 201 et seq.).

(c) "Nutrients". Protein and those vitamins and minerals listed in 21 CFR 1.17(c) (7) (iv) and 21 CFR 125.1(b).

(d) "United States Recommended Daily Allowances" (U.S. RDA). The nutrients and levels established, subject to amendment, in 21 CFR 125.1.

(e) "Serving". That reasonable quantity of food suited for or practicable of consumption as part of a meal by an adult male engaged in light physical activity or by a child who is more than 12 months of age (when the food purports or is represented to be for consumption by any such child); or, if a nutrient label is affixed to the container of the advertised food, "serving" shall be the same measure as that which is stated on the label.

(f) "Portion." The amount of a food customarily used only as an ingredient in the preparation of a meal component or, if a nutrient label is affixed to the container of the advertised food, "portion" shall be the same measure as that which is stated on the label (e.g., $\frac{1}{2}$ cup of flour, $\frac{1}{2}$ tablespoon of cooking oil).

(g) "Clearly and Conspicuously Disclose". (1) Disclosing in a manner which can be easily understood (in the case of television and print advertising, also easily seen and read) by the casual observer, listener, or reader among members of the public and which conforms (except where otherwise provided in this rule), for advertising in any media, in all relevant respects to the Commission's Statement of Enforcement Policy of October 21, 1970. (See Vol. 2, CCH Trade Regulation Reporter section 7569.09.) Each disclosure shall be presented in the same language principally employed in the advertisement. (See Commission's Statement of Policy of July 24, 1973, as amended, 38 FR 21494-95.)

(2) In any television advertisement any disclosure of information shall be made in the manner and form prescribed by § 437.2(g).

(3) In any print advertisement any disclosure of information shall be made in the manner and form prescribed by § 437.2(h).

(h) "Representation" or "Represent". Any direct or indirect statement, suggestion or implication in advertising, including but not limited to one which is made orally, in writing, pictorially, or by any other audio or visual means, or by any combination thereof.

(i) "Protein Efficiency Ratio" (PER). The protein efficiency ratio (PER) shall be determined in accordance with the method described in 21 CFR 1.17(c) (4).

§ 437.2 Form, content and method of making disclosures.

Any disclosure required or described by any provision of this rule shall be made in accordance with the following general provisions of this rule and as may be specifically prescribed in a section dealing with that particular disclosure.

(a) *Nutrients*. (1) Any advertisement which contains a representation concerning a nutrient or a disclosure of a nutrient shall make such representation or disclosure only from among the nutrients listed in 21 CFR 1.17(c) (7) (iv) and 21 CFR 125.1(b).

(2) A food shall not be represented in advertising as containing a nutrient, unless (i) the nutrient's (a) identity (stated as the common or usual name) and (b) amount (expressed as a percentage of the U.S. RDA contained in a stated serving of the advertised food) are clearly and conspicuously disclosed in accordance with all the provisions of this subpart of this rule, and unless (ii) a serving of such food contains the identified nutrient in an amount of 10 percent or more of the U.S. RDA; *provided, however*, That, in instances where a food or a serving thereof is not required to contain a nutrient at a certain percentage of the U.S. RDA before a voluntary claim is made, an advertisement may represent the presence of nutrients contained in amounts of less than 10 percent of the U.S. RDA per serving if the identities of all nutrients required to be disclosed by 21 CFR 1.17 when a nutrition claim is made, as well as their respective percentages of the U.S. RDA per serving (including zero percent), are clearly and conspicuously disclosed in accordance with all of the provisions of this subpart of this rule. If a food or a serving thereof is required to contain any nutrient at a certain percentage of the U.S. RDA before a voluntary claim may be made (see Subpart B), the actual percentage (prior to any rounding off) of the U.S. RDA at which any such nutrient is contained in the advertised food or a serving thereof shall determine whether the condition(s) for making the claim has (have) been satisfied.

(3) An advertised food or a serving thereof may not be represented as containing a nutrient in an amount of 50 percent or more of the U.S. RDA, unless such food or serving contains the identi-

fed nutrient only in a naturally occurring (indigenous) form or such nutrient has been added in compliance with 21 CFR 1.17(a)(2).

(4) Disclosures of nutrients shall be expressed to the nearest two percent increment up to and including the 10 percent level; to the nearest five percent increment above the 10 percent level and up to and including the 50 percent level; and to the nearest 10 percent increment above the 50 percent level. If the percentage falls equidistant between the upper and lower increment in any percentage level, the disclosure shall be expressed as the lower increment.

(b) *Protein.* (1) The percentage of the U.S. RDA of protein present per serving of the advertised food shall be based on a U.S. RDA of 45 grams of protein, if the total protein has a PER equal to or greater than the PER for casein; or based on a U.S. RDA of 65 grams of protein, if the total protein has a PER less than that of casein.

(2) Except with respect to the amount of protein as permitted by the proviso in paragraph (a)(2) of this section, representations in advertising of the presence of protein may be made only if a serving of the advertised food contains protein at a level of 10 percent or more of the U.S. RDA and the total protein in the advertised food alone has a PER of 20 percent or more of the PER of casein.

(c) *Analytical methods.* The procedures and methods used for determining the amount of any nutrient contained in an advertised food shall be in accord with the provisions of 21 CFR 1.17 or, where applicable, 9 CFR.

(d) *Calories.* The energy content of a food shall be stated in calories per serving, expressed to the nearest two calorie increment up to and including 20 calories; to the nearest five calorie increment above 20 calories and up to and including 50 calories; and to the nearest 10 calorie increment above 50 calories. Calorie content shall be determined in the manner described in 21 CFR 1.17(c)(3).

(e) *Serving or portion.* Statements regarding servings or portions shall be consistently stated in terms of a convenient unit of such food or a convenient unit of measure that can be easily identified as an average or usual serving or portion and can be readily understood as such by purchasers of such food. Servings or portions may be expressed in terms of ounces, fluid ounces, tablespoonfuls, cupfuls, or other customary or usual units, and shall be consistent with the applicable provisions of 21 CFR 1.17. Provisions of this rule which refer to "servings" shall be construed to mean "portions" if the use of the latter term would be more appropriate with respect to a particular food or ingredient.

(f) *Identification and designation of foods.* A food shall be identified or designated in accordance with any applicable Federal regulations prescribed in the Code of Federal Regulations. Non-standardized foods shall be identified or designated by their respective common or usual names, if such exist, pursuant to 21 CFR Part 102.

(g) *Television advertisements—method and form of disclosures.* Under § 437.2

(a) and (b) and Subpart B of this rule, any disclosure in any television advertisement shall be made in the same portion (audio or video) of the advertisement in which the voluntary claim is made. The video portion of the disclosure in each advertisement shall be prominently displayed in the form of a super or title, or prominently displayed on the screen by itself so as to enable it to be completely and easily seen and read on all television sets, regardless of picture tube size, that are commonly available for purchase by the consuming public. Any disclosure required by Subpart B of this rule in any advertisement shall be made in immediate conjunction with the voluntary claim which creates the requirement for such disclosure.

(h) *Print advertisements—method and form of disclosures.* (1) Any disclosure in a print or display advertisement shall be prominently displayed in any sans serif type style consistent with the requirements set forth in § 437.1(g)(1) and hereinbelow, but in no event in condensed type. The type shall be set on a slug at least one point larger than the point size of the type (not solid), using only normal word and letter spacing. A determination of whether a particular disclosure is "clear and conspicuous" within the definition set forth under § 437.1(g)(1) of this rule shall be made by examining the context of the total advertisement, but in no event shall a disclosure be deemed clear and conspicuous unless it appears in type of at least the following sizes, size being measured by the height of the smallest letter employed in making the disclosure:

(i) At least $\frac{1}{8}$ inch type, in advertisements of a trim size not larger than 65 square inches.

(ii) At least $\frac{3}{16}$ inch type, in advertisements of a trim size larger than 65 square inches, but not larger than 110 square inches.

(iii) At least $\frac{1}{4}$ inch type, in advertisements of a trim size larger than 110 square inches, but not larger than 180 square inches.

(iv) At least type of a size bearing the same proportion to the size of the advertisement as the proportion of $\frac{1}{4}$ inch to 180 square inches, in print advertisements of a trim size larger than 180 square inches.

(v) For any billboard or other display advertisement (except one which is located in the interior of a public transit vehicle) normally viewed and read from a distance substantially greater than the normal range of reading distances for a book, newspaper, magazine, or other similar printed reading matter:

(a) At least $\frac{1}{4}$ inch type in advertisements of a trim size larger than 180 square inches, but not larger than 270 square inches.

(b) At least $\frac{1}{2}$ inch type in advertisements of trim size larger than 270 square inches, but not larger than 1500 square inches.

(c) A size of one inch per 3000 square inches times the area of the advertisement expressed in square inches, (i.e., $\text{size} = (1 \text{ inch} / 3000 \text{ square inches}) \times (\text{area of the advertisement in square inches})$), but in no event of a size less than $\frac{1}{2}$

inch, in advertisements of trim size larger than 1500 square inches.

(2) If a print advertisement appears on more than one page, and if the total area of the advertisement is greater than the area of the largest page upon which it appears, the required type size shall be determined as though the advertisement were of an area equal to the area of the largest page upon which it appears.

(3) In the case of advertisements that are in whole or part lighted or reflectively surfaced or advertisements otherwise prepared for enhanced visibility, any disclosure shall be lighted or otherwise treated in the same manner as the most prominently lighted or otherwise specially treated portion of the advertisement.

(4) For multi-sided displays and like advertising material, the required type size shall be determined as though the advertisement were of an area equal to the area of the major display area of the display, and any disclosure shall be prominently positioned upon such display area.

(5) For unusual advertising materials or materials too small to reasonably comply with the requirements of paragraphs (h)(1) through (4) of this section, the Commission may establish acceptable alternative forms of making the required disclosures. A petition formally requesting permission to utilize an alternative form of disclosure may be submitted to the Secretary for due consideration by the Commission.

Subpart B—Voluntary Claims

§ 437.3 Emphatic nutrition claims.

Emphatic, extraordinary, positive or similar claims concerning the nutritional value of a food with general or specific reference to any nutrient(s) contained in such food, including but not limited to the use of terms such as "lots (or 'full') of -----", "high (or 'rich') in -----", "packed (or 'loaded') with -----", and "excellent (or 'significant' or 'good') source of -----" shall not be used in advertising unless:

(a) The identity of any nutrient upon which the claim is based, as well as the percentage of the U.S. RDA per stated serving provided by each such identified nutrient, is clearly and conspicuously disclosed; and

(b) A serving of the advertised food contains each nutrient identified pursuant to paragraph (a) of this section in an amount of at least 35 percent of the U.S. RDA.

§ 437.4 Nutrient comparison claims.

(a) Representations in advertising which make a comparative claim for the amount of any nutrient contained in an advertised food shall not be made, unless:

(1) The comparison is with an equal-sized serving of a commercially available food; and

(2) If a serving of the advertised food contains the same number of calories as or fewer calories than an equal-sized serving of the compared food, the compared food contains no more than two nutrients in amounts greater by 10 percent or more of the U.S. RDA than the amounts (including zero percent) at

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which the same two nutrients are contained in a serving of the advertised food; and

(3) If a serving of the advertised food contains more calories than an equal-sized serving of the compared food, the compared food contains no more than two nutrients in amounts greater on a per 100 calorie basis than the amounts (including zero percent) at which the same two nutrients are contained in a serving of the advertised food; and

(4) If the comparison concerns protein, a serving of the advertised food contains protein of at least the same quality as that contained in an equal-sized serving of the compared food; and

(5) The identities of the advertised and compared foods are clearly and conspicuously disclosed; and

(6) The advertised food and the food with which it is compared normally serve the same purpose in the diet; and

(7) The same nutrients are compared and the name of each such compared nutrient is clearly and conspicuously disclosed; and

(8) The percentage of the U.S. RDA of each compared nutrient provided by a stated serving of the advertised food is clearly and conspicuously disclosed; and

(9) If an advertised food is represented as one which contains any nutrient in any amount greater than the amount of such nutrient in another food, the amount contained in a serving of the advertised food exceeds that contained in an equal-sized serving of the compared food by at least 10 percent of the U.S. RDA.

(b) A food shall not be represented in advertising to be a substitute or replacement for another food (unless it is a food labeled "imitation" in compliance with 21 CFR 1.8), or as nutritious as another food, unless:

(1) A serving of the advertised food contains at least the same nutrients as those nutrients contained in an amount of 2 percent or more of the U.S. RDA in an equal-sized serving of the compared food, and each such nutrient is present in the advertised food in an amount which is at least equivalent to the amount at which each is contained in an equal-sized serving of the compared food; and

(2) If the compared food contains protein, a serving of the advertised food contains protein of at least the same quality as that contained in an equal-sized serving of the compared food; and

(3) The identity of the compared food and number of calories provided by equal-sized, stated servings of the advertised and compared foods, respectively, is clearly and conspicuously disclosed; and

(4) If the advertised food contains a higher fat content than the compared food, such fact, as well as the total fat content (in accordance with 21 CFR § 1.17(c)(6) and 1.18(c)(2)(i)), is clearly and conspicuously disclosed; and

(5) If an advertisement is for a food labeled "imitation" in compliance with 21 CFR 1.8, it is clearly and conspicuously disclosed that such food is not as nutritious as the food for which it is intended to be a substitute or replacement.

(c) A food shall not be represented in advertising to be nutritionally superior to another food, unless:

(1) The nutrients in a serving of the advertised food provide at least 10 percent more of the U.S. RDA than are provided by those nutrients contained in an amount of 2 percent or more of the U.S. RDA in an equal-sized serving of the compared food; and

(2) If the compared food contains protein, a serving of the advertised food contains protein of at least the same quality as that contained in an equal-sized serving of the compared food; and

(3) The identity of the compared food and number of calories provided by equal-sized, stated servings of the advertised and compared foods, respectively, is clearly and conspicuously disclosed; and

(4) If the advertised food contains a higher fat content than the compared food, such fact, as well as the total fat content (in accordance with 21 CFR 1.17(c)(6) and 1.18(c)(2)(i)), is clearly and conspicuously disclosed.

§ 437.5 Nourishment claims.

(a) An advertisement shall not represent a food to be "nourishing", "wholesome", "nutritious", or use any other term of similar import which in any way states, suggests or implies that such food is a valuable or significant source of nutrition, unless a serving of the food contains at least four nutrients, including protein, each of which is present in an amount of at least 10 percent of the U.S. RDA per 100 calories, and unless at least one of such nutrients is present in a serving of such food in an amount of at least 10 percent of the U.S. RDA; provided, however, That such terms may be used to describe any identified nutrient(s) which is (are) contained in such food (e.g., "nutritious Vitamin C"), subject to the provisions of § 437.2(a)(2) of this rule.

(b) A food or a serving thereof shall not be represented in advertising as providing all of the nutrients necessary for a sound, complete or balanced diet, unless it satisfies the U.S. RDA requirements for protein, vitamins and minerals prescribed in 21 CFR Part 125, and unless competent and reliable scientific tests demonstrate that such food is a total diet replacement.

(c) Subject to the provisions of paragraph (b) of this section, an advertisement shall not represent that an advertised food or a serving thereof alone is "perfect" or "nutritionally perfect", provides "complete nutrition", contains "all the good things you need", or use any other term of similar import which in any way states, suggests or implies that consumption of only the advertised food will provide enough nutrition to constitute a sufficient and full source of nutrition; or that consumption of the advertised food or a serving thereof maintains health, makes an individual well-fed or in any way is a unique, special or exclusive source of nutrition or health benefits.

(d) An advertisement shall not represent that a food or a serving thereof constitutes a nutritionally adequate meal,

unless such advertised food or serving thereof complies with an applicable Federal regulation prescribed in the Code of Federal Regulations:

§ 437.6 Natural and organic food claims. [Reserved]

[See Explanation of Proceeding and Analysis and Statement of Issues by Section.]

§ 437.7 Claims for foods intended to be combined with other foods.

(a) If, in order to prepare a food for consumption, it is necessary for a consumer to add to an advertised food any other food(s), characterizing ingredient(s) or component(s), as such ingredient(s) or component(s) is (are) defined in 21 CFR 102.1, that fact shall be clearly and conspicuously disclosed in any advertisement for such food.

(b) An advertisement for a food described in paragraph (a) of this section may represent that consumption of a serving of the combination provides a designated percentage of the U.S. RDA of each of the nutrients contained in a serving of such combination, subject to the provisions of § 437.2(a)(2) of this rule. However, a representation that the advertised food alone provides a designated percentage of the U.S. RDA of the nutrients which are contained in a serving of such combination shall not be made.

(c) If a serving of the food(s), ingredient(s) or component(s) with which an advertised food is (are) necessarily combined contributes more than 50 percent of the U.S. RDA of any nutrient named in the advertisement, it shall be clearly and conspicuously disclosed that most of such nutrient is provided by such food(s), ingredient(s) or component(s).

(d) If an advertised food is frequently, but not necessarily, combined with any other food(s), ingredient(s) or component(s) for consumption, any representation regarding nutrition shall be based on the nutritional value of the advertised food alone.

§ 437.8 Energy and calorie claims.

(a) An advertisement shall not represent that a food or nutrient contains, produces, provides, enhances, or is a source of "energy" or "food energy", or use any other word, demonstration or depiction of similar import, unless it clearly and conspicuously discloses, in immediate conjunction with the making of each such representation, that "energy" or "food energy" is supplied by calories, as well as the number of calories contained in a stated serving of the advertised food.

(b) An advertisement shall not represent that consumption of a food or nutrient, by itself, will produce or provide health, general vigor, sustained energy or alertness, or that the energy from calories, by itself, will produce or provide strength, endurance, intellectual performance, or the prevention or relief of fatigue.

(c) An advertisement shall not represent that consumption of a food in any way enhances or contributes to a person's vigor, energy, alertness, strength or endurance, unless it clearly and conspicuously discloses, in immediate con-

junction with the making of each such representation:

(1) That such vigor, energy, alertness, strength or endurance is enhanced by and depends, in part, upon the calories in the food; and

(2) The number of calories contained in a stated serving of the advertised food.

(d) An advertisement shall not represent that consumption of any food or meal is useful for, or contributes in any way to, or is useful in, regulating or maintaining caloric intake or body weight by the use of any demonstration or depiction, or any word or phrase such as "diet", "dietetic", "low caloric", "low in calories", "fewer calories", "calorie reduced", "contains artificial sweeteners", "artificially sweetened", or any other demonstration, depiction or term of similar import, unless:

(1) The advertised food complies with the provisions of 21 CFR 125.6; and

(2) The number of calories contained in a stated serving of the advertised food is clearly and conspicuously disclosed.

(e) An advertisement for a food which makes any representation described in paragraph (d) of this section, and which contains any artificial sweetener, except one which serves an authorized technological purpose (as defined in 21 CFR 125.1(i)) shall comply with the provisions of paragraphs (d)(1) and (2) of this section, and

(1) Shall clearly and conspicuously disclose the number of calories contained in a stated, equal-sized serving of the same food made with nutritive sweeteners; and

(2) If the artificially sweetened product contains a nutritive sweetener, the advertisement shall clearly and conspicuously make the following specific disclosure:

This food contains sugars and should not be used by diabetics without the advice of a physician.

(f) An advertisement shall not represent that a food is "sugarless", "sugar free", "contains no sugar" or use any other term of similar import, unless such food contains no sugars, including, but not limited to, sorbitol, mannitol, or other hexitol(s).

§ 437.9 Fat, fatty acid and cholesterol content claims. [Reserved]

[See Explanation of Proceeding and Analysis and Statement of Issues by Section.]

§ 437.10 Health and related claims. [Reserved]

[See Explanation of Proceeding and Analysis and Statement of Issues by Section.]

EXPLANATION AND BASIS OF PROCEEDING

The instant proceeding is designed for three purposes:

(1) To elicit comment on the Proposed Trade Regulation Rule on Food Advertising and on certain issues relating to voluntary claims in food advertising as to which the Commission has not as yet proposed particular rule provisions.

(2) To elicit comment on the issues raised by the Staff Statement of Fact, Law and Policy, including, in particular,

the form which the disclosures called for therein should take.

The Proposed Trade Regulation Rule on Food Advertising is designed to eliminate deception and unfairness which may result from the making of certain affirmative claims with respect to nutrition. This proposed rule establishes uniform definitions for certain terms the use of which is subject to ambiguity and deception, and prohibits outright certain other claims the making of which is deceptive.

The Commission has long been recognized to have the power to prohibit claims that are deceptive or unfair.¹ The Commission has prohibited such claims by the promulgation of trade regulation rules in the past,² and has similarly utilized rules to establish preconditions to the making of certain claims heretofore.³ Similarly, the courts have often affirmed the power of the Commission to order disclosure as a condition of making claims which would otherwise be deceptive.⁴ In view of the considerable importance of nutrition information to consumers, as described in the staff statement, and in view of the deception and unfairness which may result from the use of various terms and claims relating to nutrition, the Commission believes that an adequate basis now exists to warrant promulgation for comment of a proposed rule regulating the use of such terms and representations.

In addition, the staff of the Commission is of the view, for reasons described at length in its statement, that it is an unfair and deceptive act or practice under section 5 for advertisers of food products to fail to disclose affirmatively certain information concerning the nutritive quality of advertised food products. The Commission is extremely concerned about the considerations discussed in the staff statement, including the implications for food advertising raised by the Food and Drug Administration's nutrient labeling program. The Commission has therefore concluded that it is in the public interest to solicit comment on the staff statement, including, in particular, the form which the affirmative disclosures called for in that statement might take.

¹ *Sears, Roebuck & Co. v. F.T.C.*, 258 F. 307 (7th Cir. 1909). See also, "Developments in the Law—Deceptive Advertising," 80 Harv. L. Rev. 1005, 1019-1027 (1967).

² See, e.g., *Incandescent Lamp (Light Bulb) Industry*, 16 CFR 409; *Power Output Claims for Amplifiers Utilized in Home Entertainment Products*, 39 FR 15387 (May 3, 1974).

³ See, e.g., *Guides For the Feather and Down Products Industry*, 16 CFR Part 253; *Trade Regulation Rule: Misbranding and Deception As To Leather Content of Waist Belts*, 16 CFR Part 409.

⁴ *J. B. Williams Co. v. F.T.C.*, 381 F.2d 884 (6th Cir. 1967); *Keele Hair & Scalp Specialists, Inc. v. F.T.C.*, 275 F.2d 18 (5th Cir. 1960); See also, *P. Lorillard Co. v. F.T.C.*, 186 F.2d 32, 38 (4th Cir. 1950). ("To tell less than the whole truth is a well known method of deception; and he who deceives by resorting to such method cannot excuse the deception by relying upon the truthfulness per se of the partial truth by which it has been accomplished.")

ANALYSIS AND STATEMENT OF ISSUES BY SECTION

This Analysis and Statement of Issues by Section is designed to facilitate comment on the Proposed Trade Regulation Rule on Food Advertising and on the staff statement respecting affirmative disclosure and to designate the issues which the Commission is particularly interested in having addressed during the time period provided for written comments. The issues which have been designated include matters of fact, law and public policy. Although the Commission has not finally determined the procedures that will be employed in a public hearing, it is the Commission's present intent to limit oral comment to issues of fact. Thus, any comments upon questions which relate to legal or public policy considerations should be submitted in writing. Since additional issues of fact may be raised by the written comments, a revised list of factual issues (which will not include the non-factual issues designated in this statement) will be specified prior to hearings on the proposed rule and staff statement.

The designation of issues in this Analysis and Statement of Issues by Section is not intended to limit public comment on the proposed rule and staff statement. Rather, the Commission invites the general public and all interested parties to comment in writing on any and all questions of fact, law or public policy raised by the proposed rule and the staff statement. Likewise, publication of the present proposed rule and staff statement is intended to invite rather than discourage comment concerning the content of a rule regulating food advertising.

All comments should be referenced specifically to the proposed rule or staff statement. Comments opposing the proposed rule or specific provisions in it should either argue, with reasons and data, why no rule at all should be imposed, or should propose a specific alternative. Proposals for alternative regulations should include reasons and data which indicate why the proposed alternatives would better serve the purposes of the proposed rule, including reasons and data showing how their adoption would better mitigate the deception or unfairness in food advertising. All comments should be supported by a full exposition of all relevant factual evidence and legal arguments.

Comments asserting matters of fact not based upon firsthand knowledge or personal experience of the person commenting or matters of fact or opinion requiring some special practical experience, training or education not possessed by the average layperson will be considered only if they are made and signed by a named person shown to possess such experience, training or education as to qualify him or her comment on the particular matter. The Commission also invites comments from all interested parties, including laypersons, which are shown to be based directly on firsthand knowledge, personal experience or general understanding of the particular issues, such as the desire or need for the information or standards required to be

disclosed or implemented by the proposed rule.

The proposed rule consists of a preamble and two parts. Subpart A sets forth the definitions of terms embodied in the proposed rule and establishes the specific form, content and method for making disclosures required by the proposed rule. Subpart B establishes specific requirements which must be met before certain affirmative nutrition claims can be made in food advertising.

Subpart A—General

§ 437.1 Definitions.

(a) "Advertisement" or "Advertising".

Under this definition, the proposed rule covers all food advertising with the following two exceptions:

1. Advertisements promulgated by retail supermarkets, food stores and wholesale food establishments if

a. The contents of the advertisements relate only to price; and

b. The advertisements contain no nutrition claims; and

2. Point-of-purchase advertising for all foods.

(b) "Food".

Self-explanatory.

(c) "Nutrients".

This provision adopts, for purposes of the proposed rule, a definition of nutrients which parallels the definition utilized by the Food and Drug Administration in connection with its nutrient labeling program. The definition specifically includes protein and those other "primary" and "optional" nutrients (see Analysis and Statement of Issues by Section, § 437.2(a)) for which a U.S. Recommended Daily Allowance (U.S. RDA) has been established, namely Vitamin A, Vitamin D, Vitamin E, Vitamin C, Folic Acid, Thiamine, Riboflavin, Niacin, Vitamin B₆, Vitamin B₁₂, Biotin, Pantothenic Acid, Calcium, Phosphorus, Iodine, Iron, Magnesium, Copper, and Zinc. It does not include other vitamins or minerals which are recognized as essential to human life but which have no established U.S. RDA. Nor have carbohydrates, fats, and water been included in the proposed rule's definition of "nutrients". The definition is restricted in this manner so as to limit criteria for claims established by Subpart B to those nutrients which are not only recognized as essential but for which the recommended daily quantities have been determined.

ISSUES

1. Would it better serve the purposes of the proposed rule to expand the definition of "nutrients" to include nutrients for which there is no established U.S. RDA? If so, which nutrient(s)?

(d) "United States Recommended Daily Allowances" (U.S. RDA). This provision, by adopting the FDA-approved method for expressing in labeling the nutritional value of a food, enhances the compatibility of the proposed rule's advertising disclosures with the FDA required labeling disclosures.

(e) "Serving". This provision is also designed to promote consistency between advertising and labeling claims by requiring nutrition claims in advertising

to be based on the same serving size that appears on the label.

(f) "Portion". Again, the purpose of this provision is to achieve consistency between advertising and labeling claims.

(g) "Clearly and conspicuously disclose". This provision is intended to ensure that the disclosures required by the proposed rule will be visible and comprehensible to viewers or readers and is based upon the relevant Commission policy statements setting forth standards for clear and conspicuous disclosure. This provision is linked to other provisions of the proposed rule which set forth specific requirements for disclosures in television and print advertising.

(h) "Representation" or "Represent". Self-explanatory.

(i) "Protein Efficiency Ratio" (PER). This provision adopts the same method for determining the quality of a protein as that which was adopted by the Food and Drug Administration in connection with its nutrient labeling program.

§ 437.2 Form, content and method of making disclosures.

(a) *Nutrients*. This provision sets forth certain requirements with respect to representations concerning or disclosures of nutrients in advertising. This particular section is designed to ensure that any disclosures or representations of nutrient content of a food which are governed by the proposed rule will be made in a uniform manner so that they can be most easily understood and utilized by consumers in evaluating advertised foods and in comparing the nutritional values of advertised foods.

Subparagraph (1) provides that all disclosures or representations concerning nutrients must be made from among the nutrients for which there is an established U.S. RDA.

Subparagraph (2) requires the disclosure of a nutrient's identity (common and usual name) and amount (percentage of U.S. RDA) per stated serving each time a claim is made.

Subparagraph (2) further establishes the level of significance for advertising disclosures of nutrients at 10 percent of the U.S. RDA per stated serving. Since space is limited in advertising and it appears that advertising disclosures of nutrient content will be interpreted as positive statements about the food's content of that nutrient, disclosures or claims of nutrient content are permitted only if a nutrient is present in a significant amount. FDA's nutrient labeling program also prohibits claims that a food is a significant source of a nutrient unless the nutrient is present in a food in an amount of at least 10 percent of the U.S. RDA, although FDA requires disclosure of the amounts at which each of the eight primary nutrients is contained in a serving, including zero percent, thereby achieving a complete nutrition profile of specific nutrient data on the label, that may not be an appropriate required disclosure for all television and radio advertising.

If a particular provision of the proposed rule does not establish a minimum quantitative level at which a nutrient must be present before a voluntary

claim may be made,* this subparagraph would permit a representation regarding a nutrient which is not contained in a significant amount, provided that there is full disclosure, in a clear and conspicuous form and manner as required by the proposed rule, of the identities and percentages (including zero percent) of the U.S. RDA per serving of all of the primary nutrients. In this instance, it is intended that any possibly deceptive implication that an identified nutrient is present in a nutritionally significant amount (10% or more of the U.S. RDA per serving) when such is not the fact will be effectively prevented by requirements which ensure that a fair and relatively full disclosure of the food's overall nutritional value is provided and that such a disclosure is clearly and conspicuously made in a form and manner which is suited to the particular advertising medium chosen by the advertiser to make the representation.

Subparagraph (2) also requires that the actual percentage of the U.S. RDA of a nutrient in an advertised food—prior to rounding-off—will be used to determine if the requirements for disclosure or for making a voluntary claim under Subpart B of the proposed rule have been met.

Subparagraph (3) allows claims referring to nutrient content in excess of 50% of the U.S. RDA only where the nutrient naturally occurs at those levels in the food or the food has been fortified in compliance with regulations of the Food and Drug Administration.

Subparagraph (4) provides for rounding-off of percentages of the U.S. RDA in nutrient disclosures. This is designed to prevent consumers from being misled by insignificant differences in the nutrient content of two foods.

ISSUES

1. Is it appropriate to permit in advertising (television? radio? print?) representations regarding nutrients which are not present in nutritionally significant amounts in view of the fact that a disclosure of the complete nutrition profile of specific nutrient data on the label will be required; or should such truthful representations be prohibited in advertising (television? radio? print?) due to the possibly misleading implications of nutritional significance that might follow from any reference to the presence of such nutrients?

(b) *Protein*. This provision is intended to prohibit claims for protein unless the protein is present in the advertised food in a significant quantity (except as otherwise permitted by the proviso contained in § 437.2(a)(2)) and the quality of the protein is sufficient so that it may be utilized by the human body in a meaningful way. It is based on the principle that individuals must eat a greater quantity of low quality protein to fulfill their nutritional requirements than they must eat if the protein is high in quality. The method of computation is the same as

*Section 437.3(b) illustrates a provision which does require the presence of a nutrient in a specified amount before any claim may be made.

that used by the Food and Drug Administration in its nutrient labeling regulation.

ISSUES

1. Are the proposed standards for protein quality and quantity sufficiently high? If not, what other standards might be established which would be sufficiently compatible with the nutrient labeling program standards so as to neither confuse consumers nor unreasonably burden advertisers?

2. Should the proviso contained in § 437.2(a)(2) apply to representations regarding the quantity of protein as well as such representations relating to those vitamins and minerals considered as "nutrients"?

(c) *Analytical methods.* This provision requires the same methods of laboratory analysis to be used in connection with nutrient disclosures and claims in advertising as are used for nutrient labeling under the Food and Drug Administration's program.

(d) *Calories.* Calorie content is to be measured by the same methods used in the Food and Drug Administration's nutrient labeling program. This provision requires the rounding-off of calorie disclosures so that consumers will not be misled into thinking that one product is superior to another based on an insignificant difference in their caloric contents.

(e) *Serving or portion.* This provision is directly based on the Food and Drug Administration's regulation on serving sizes for the nutrient labeling regulations in order to promote consistency between labeling and advertising.

(f) *Identification and designation of foods.* This provision requires food advertisers to use the name of a food that the Food and Drug Administration has determined to be appropriate, when such a determination has been made.

(g) *Television advertisements—method and form of disclosure.* This provision is intended to ensure that the required disclosures of nutrition information are made in an intelligible manner. It states that all disclosures required by Subpart B of the proposed rule must be made in the same portion of the advertisement and in immediate conjunction with the voluntary claim which triggers the requirement for such disclosure. It also sets forth requirements for any disclosures in the video portions of such advertisements.

(h) *Print advertisements—method and form of disclosures.* This provision establishes minimum specifications for disclosures made in print advertisements to be certain that the information required to be disclosed is presented in an easily intelligible manner. It should be noted that although a disclosure failing to meet these standards would be per se inadequate under the proposed rule, a disclosure that does meet these standards would not be per se adequate, since whether or not a given disclosure is clear and conspicuous can be judged only in the total context of the advertisement in which it appears.

ISSUES

1. Will the proposed specifications adequately ensure that disclosures are clear, conspicuous and comprehensible to consumers?

2. What alternative specifications, if any, would serve the purpose of the rule as well as, or better than, the proposed specifications, while further reducing the burden on advertisers?

Subpart B—Voluntary Claims

§ 437.3 Emphatic nutrition claims.

Vague claims mentioning nutrients are often used to exaggerate the nutritional characteristics of a food without providing any specific information concerning the actual value of the food. To remedy this unfair and deceptive practice, the proposed rule establishes minimum standards for the making of emphatic claims.

Under the proposed rule emphatic nutrition claims may be made only when:

1. The identity of any nutrient on which the claim is based is disclosed;
2. The percentage of the U.S. RDA of any identified nutrient contained in a stated serving of the advertised food is disclosed; and
3. A serving of the advertised food contains at least 35% of the U.S. RDA of each nutrient identified as a basis for an emphatic claim.

The 35% minimum is designed to ensure that a food for which emphatic nutrition claims are made makes a highly significant contribution of the claimed nutrient to the diet. Thus, such a food would have to contribute approximately one-third of the U.S. RDA for that nutrient.

While claims that a food "contains lots of nutrients" or "is rich in vitamins" could be made under the Proposed Rule, by requiring identification of nutrients and the percentage of U.S. RDA the rule would eliminate the vagueness which has heretofore attended such claims. (See also Analysis and Statement of Issues by Section, explanation of § 437.2(a)(2).) A claim that a food is a "good source of Vitamin C" would also be improper unless the percentage of Vitamin C in a normal serving size were disclosed and it constituted more than 35% of the U.S. RDA for the nutrient.

ISSUES

1. Is the fact that a serving of food contributes 35% of the U.S. RDA of the claimed nutrients a sufficient contribution to the diet to justify an emphatic claim?

2. Is there a lower percentage contribution which is sufficient to justify an emphatic claim?

§ 437.4 Nutrient comparison claims.

(a) *Comparative claims for the amount of any nutrient.* This provision specifies the prerequisites for making a comparative claim dealing with specific nutrients, e.g., that "Food X is higher in (or 'contains more') Niacin than Food Y". The basic reasons for establishing various prerequisites to the making of such a claim are to be certain that: The exact nature and scope of the claim is

clearly stated; equal-sized servings of commercially available foods are compared (in order to prevent dangling comparatives such as "more Vitamin C" or "highest in the Calcium"); a claim by one food that it contains a higher content of a particular nutrient than another food is based on a significant difference (10% of the U.S. RDA); and the advertised food and the compared food are relatively similar in all other respects. The last requirement is necessary to avoid the potentially deceptive implication that an advertised food is nutritionally superior to a compared food just because it contains more of one nutrient, even though in all or most other respects the compared food is nutritionally more valuable. Thus, the measure of parity is not only those nutrients present both in the compared food and the advertised food but, rather, all nutrients present in the compared food in significant amounts.

Three of the requirements for assuring relative nutritional parity are therefore:

1. The two foods must normally serve the same purpose in the diet;
2. If the comparison concerns protein, the protein in the advertised food must be of at least the same quality as that contained in the compared food; and
3. If the advertised food contains the same or fewer calories than an equal-sized serving of the compared food, not more than two nutrients can be present in the compared food in amounts greater by 10% or more than the amounts at which the same two nutrients are contained in the advertised food.

EXAMPLE.—Actual percent of U.S. RDA per serving*

	Advertised food X	Compared food Y
Protein..... percent.....	4	11
Vitamin A..... do.....	61	16
Vitamin C..... do.....	11	31
Thiamine..... do.....	23	15
Riboflavin..... do.....	21	24
Niacin..... do.....	36	51
Calcium..... do.....	9	9
Iron..... do.....	21	39
Calories.....	120	140

* This hypothetical example is designed only to illustrate the operation of the proposed rule. It should be noted that the percentage comparisons must be made on the basis of the actual amount at which each nutrient is contained in a serving (see § 437.2(a)(2)).

The claim could not be made. Although the advertised food does contain Vitamin A in an amount greater by 10% or more of the U.S. RDA than the same nutrient is contained in the compared food, the compared food contains three nutrients which are present in amounts greater by 10% or more of the U.S. RDA than the amounts at which the same three nutrients are present in the advertised food. Thus, the percentage of U.S. RDA of Iron in a serving of the compared food is greater by at least 10% than the percentage of Iron in a serving of the advertised food. The same result occurs when the percentages of the U.S. RDA of Niacin and Vitamin C in the compared food are compared to the percentages of the U.S. RDA of those same nutrients in the advertised food.

In making the above determination the advertiser must look at all nutrients present in each food for which there is an

established U.S. RDA to evaluate whether such a claim can be made. The underlying nutrient comparisons which determine whether a claim may be made under this paragraph, for § 437.4(a) (2) and (3), are between any nutrient in the compared food and the same nutrient in the advertised food.

Section 437.4(a) establishes one additional requirement which is intended to ensure relative nutritional parity between the foods about which a specific nutrient comparison is made. If a serving of the advertised food contains more calories than an equal-sized serving of the compared food, then the compared food may not contain more than two nutrients on a per 100 calorie basis in amounts greater than the amounts at which the same two nutrients are contained in a serving of the advertised food. The theory behind this requirement is that if a serving of the advertised food contains more calories than a comparable serving of the compared food and these calories do not provide an amount of nutrients proportionately equal to or greater than all but a maximum of two nutrients that are contained in a serving of the compared food, then it would be misleading to promote the advertised food for its higher content of one or more nutrients. Since the advertised food contains more calories per serving than the compared food (and is nutritionally inferior in that respect), it is important to ensure that its overall nutrient/calorie balance be comparable to the compared food before a nutrient comparison claim may be made. Here, as in § 437.4(a) (2) of the proposed rule, the comparisons are made between any nutrient in the compared food and the same nutrient in the advertised food.

The following is an example of the way in which a calculation is made using a nutrient-per-100-calorie basis. If a serving of food A (advertised food) contains 300 calories and 51% of the U.S. RDA for Vitamin A and a serving of food B (compared food) contains 200 calories and 40% of the U.S. RDA of Vitamin A, then food A has 17% per 100 calories and hence has a lower nutrient/calorie basis for Vitamin A than does food B which contains 20% per 100 calories. Under the proposed rule, if the nutrient-per-100-calorie calculations for two or more other (and, thus, a total of three or more) vitamins, minerals and/or protein in a serving of food B were greater than such calculation for the same two nutrients in food A, food A would not be able to claim that it had more Vitamin A per serving than a comparable serving of food B.

ISSUES

1. Should nutrient comparison claims permitted by the proposed rule be limited to foods which serve the same purpose in the diet?
2. Should the test for permitting a comparison between the quantity of a specific nutrient in the advertised food and the amount of that nutrient in the compared food be based on an overall comparison between those nutrients contained in the compared food and the same nutrients in the advertised food;

or should the quantities of each nutrient in the compared food be compared with the quantity at which any nutrient is contained in the advertised food? Are there additional or alternative tests of nutritional equivalence which should be met before a nutrient comparison claim may be made?

(b) *Representations that a food is a substitute or replacement for, or as nutritious as, another food.* This provision contains five requirements for making claims that a food is a substitute or replacement for another food or is as nutritious as another food. These requirements mandate virtual nutritional equivalency between two foods before such claims are made, since the likely effect of such claims on consumers is to cause them to replace the compared food in their diet with the advertised food. The prerequisites to the making of such claims are intended to ensure that consumers will not suffer any significant nutritional detriment when they consume foods purchased on the bases of such claims. There are two absolute prerequisites to such a claim:

1. A serving of the advertised food must contain all nutrients present in "measurable amounts" (i.e., 2% of the U.S. RDA) in the compared food in at least the same amounts as they are contained in a serving of the compared food; and
2. If the compared food contains protein, the protein in the advertised food must be of at least the same quality.

If the above-described conditions exist, the identity of the compared food and the comparative caloric content of equal-sized stated servings of the advertised and compared foods must be disclosed.

Further, if the advertised food has a higher fat content than the compared food, that fact and the total fat content must be disclosed.

However, for the purposes of compatibility with the nutrient labeling program, a major exception is made to the provision: If the advertised food is labeled "imitation" in accordance with the Food and Drug Administration's regulations, it may be advertised as such and claimed as a substitute or replacement for the non-imitation product. However, any such advertisement must disclose that the food is not as nutritious as the food for which it is intended to be a substitute or replacement. This disclosure requirement in advertising merely incorporates the nutritional premise upon which FDA's nutrient labeling scheme bases its requirement that the food be designated as "imitation".

ISSUES

1. Is it appropriate to require a serving of the advertised food to contain all the nutrients contained in "measurable amounts" (i.e., 2% of the U.S. RDA) in at least the same amounts as they are contained in a serving of the compared food? If not all nutrients, as to what nutrients should there be parity?
2. Should nutrient comparisons (for purposes of satisfying the first prerequisite of making a claim under § 437.4 (b)) be between nutrients contained not

at 2 percent but at some higher level (e.g., 10% of the U.S. RDA) in a serving of the compared food?

3. Will disclosures of comparative caloric and fat content be meaningful to consumers in the context of these claims or should there be prerequisites to the making of such claims which require that a serving of the advertised food have as many calories as, or fewer calories than, a serving of the compared food, and that a serving of the advertised food have the same fat content as, or a lower fat content than, a serving of the compared food, without any requirement of disclosure?

(c) *Representations that a food is nutritionally superior to another food.* The requirements for making a nutritional superiority claim for a food are the same as those for making a claim of nutritional equivalence outlined for § 437.4(b), supra, except that a serving of the advertised food must contain all nutrients contained in "measurable amounts" (2% of U.S. RDA) in a serving of the compared food in amounts greater by 10% or more of the U.S. RDA than the amounts contained in the compared food. Thus, a generalized claim of nutritional superiority will require superiority at a significant level for each such nutrient present in the compared food in a measurable amount.

ISSUES

1. Is it appropriate to require a serving of the advertised food to contain all the nutrients contained in "measurable amounts" (i.e., 2% of the U.S. RDA) in a serving of the compared food, in amounts greater by 10% or more of the U.S. RDA than the amounts contained in the compared food, before a nutritional superiority claim can be made? If not all nutrients, as to which nutrients should a comparison be made?

2. Should nutrient comparisons (for purposes of satisfying the first prerequisite of making a claim under paragraph (c) (1)) be between nutrients contained not at 2 percent but at some higher level (e.g., 10% of the U.S. RDA) in a serving of the compared food?

3. Will disclosures of comparative caloric and fat content be meaningful to consumers in the context of these claims or should there be prerequisites to the making of claims that a serving of the advertised food have as many calories as, or fewer calories than, a serving of the compared food, and that a serving of the advertised food have the same fat content as, or a lower fat content than, a serving of the compared food, without any requirement of disclosure?

§ 437.5 Nourishment claims.

(a) *Claims that a food is a valuable or significant source of nutrition.* Such claims are not permitted unless a serving of an advertised food contains:

1. At least 4 nutrients, one of which must be protein, in amounts of 10% of the U.S. RDA per 100 calories; and
2. At least one of the nutrients is present in a serving of the advertised food in an amount of at least 10% of the U.S. RDA.

This paragraph is based on the proposition that, because calories are a limiting factor in the diet, a food is "nourishing" only if it provides a reasonable number of nutrients, given the calories supplied by that food. Therefore, a nourishment claim cannot be made for a food unless it provides 4 nutrients, including protein, in nutritionally significant amounts per 100 calories and a serving of the food provides at least one nutrient in a significant amount. (This provision does not apply to claims directed to a specific nutrient contained in a food.) The following is an example of a food that could make a nourishment claim: A serving of food X contains 50 calories and 5% of the U.S. RDA of Protein, Calcium, and Iron and 10% of the U.S. RDA of Vitamin A. Since a serving of the food contains 10% of the U.S. RDA of one nutrient and the food contains 10% per 100 calories of three others, including protein, it may claim that it is "nourishing." If a serving of food X contained 100 calories per serving but the same percentages of nutrients, no general nourishment claim for the food itself could be made, although a representation that it contained "nourishing Vitamin A" would be proper, since such a claim fulfills the requirements of § 437.2(a)(2).

ISSUES

1. Should the prerequisite for making a claim that a food is a valuable or significant source of nutrition be based on the content of 4 nutrients, including protein, in amounts of 10% of the U.S. RDA per 100 calories or should it be required that those or some of those 4 nutrients be present in amounts of 10% of the U.S. RDA per serving of the advertised food? Are there additional or alternative requirements that should be met before such a claim is allowed?

(b) *Claims that a food provides all the nutrients necessary for a sound, complete or balanced diet.*

(c) *Claims that a serving of an advertised food alone provides complete or perfect nutrition.*

These provisions collectively prohibit any representations that any food provides all the nutrients required to sustain human life unless competent and reliable scientific tests demonstrate that it constitutes a total diet replacement.

(d) *Representations that a food or a serving thereof constitutes a nutritionally adequate meal.* This provision prohibits claims that a food constitutes a nutritionally adequate meal unless it complies with any relevant federal regulation which exists or is developed to govern the making of such claims. On June 14, 1974, FDA published proposed regulations governing "formulated meal replacements" and "formulated meal bases" (see 21 CFR 100.8 and 102.21).

§ 437.6. Natural and organic food claims.

During the past several years claims have proliferated depicting food products as "natural" or "organic", or as "naturally grown" or "organically grown". Such claims have frequently stated or implied that the advertised foods possess superior nutritional characteristics. The Commission is seriously

concerned with the ability of consumers to understand these terms which are used in a wide variety of confusing and conflicting contexts. Various ameliorative approaches are possible. The staff of the Commission proposes (see Staff Statement of Fact, Law, and Policy) a prohibition on the use of the terms "natural" or "organic" (as well as "naturally grown" or "organically grown"), allowing the advertisers instead to represent the facts which they believe would otherwise warrant the use of the terms (e.g., that a food product "does not contain any artificial preservatives" or that it "does not contain any artificial fertilizers"). An alternative approach would be the establishment of uniform definitions for the use of the terms "natural" (or "naturally grown") or "organic" (or "organically grown"), if that is possible. For example, a food product might be appropriately advertised as "natural" only if it does not contain any artificial or synthetic ingredients.

ISSUES

1. What, if any, is the proper definition of the term "natural food"? "Naturally grown food"? If any such definition exists for either term, is it generally accepted (among scientists or nutritionists; among consumers) or is there confusion, misunderstanding or disagreement about it?

2. What, if any, is the proper definition of the term "organic food"? "Organically grown food"? If any such definition exists for either term, is it generally accepted (among scientists or nutritionists; among consumers) or is there confusion, misunderstanding or disagreement about it?

3. What empirical evidence, if any, is there of consumer understanding of the terms "natural", "naturally grown", "organic" and "organically grown"? If such evidence exists, does it show a consumer understanding consistent with any generally accepted definitions of those terms?

4. What evidence, if any, is available to demonstrate that so-called "natural" (or "naturally grown") or "organic" (or "organically grown") foods are in any way superior to other foods other than the extent, if any, to which they are superior by reason of the facts enumerated (and allowed to be claimed) in § 437.6(a) and (b) of the staff proposal on "Natural and Organic Food Claims"?

5. If the terms "natural" (or "naturally grown") and "organic" (or "organically grown") cannot be defined in a manner which will eliminate consumer misunderstanding, should their use in advertising be prohibited?

6. If the terms "natural" or "naturally grown" are to be prohibited in advertising, which, if any, of the following claims should be permitted where truthful:

- "... does not contain any artificial or synthetic preservatives."
- "... does not contain any artificial or synthetic flavors."
- "... does not contain any artificial or synthetic colors."
- "... does not contain any (other) artificial or synthetic ingredients."

What other claims, if any, should be allowed?

7. If the terms "organic" or "organically grown" are to be prohibited in advertising, which, if any, of the following claims should be permitted where truthful:

- "... has not been grown with (or subjected to) pesticides (or artificial fertilizers; or artificial conditioners)."

What other claims, if any, should be allowed?

8. If any specific factual claim referred to in issues 6 or 7 is to be permitted in advertising, should any further representation of nutritional superiority based on such claim be allowed?

§ 437.7 Claims for foods intended to be combined with other foods.

Paragraphs (a), (b), and (c) of § 437.7 deal with advertising problems involving food products to which a characterizing ingredient must be added in order to prepare it for consumption. This includes new products called "meat extenders" which have recently appeared on the market.

Paragraph (a) provides that for these foods it must be clearly and conspicuously disclosed that it is necessary for the consumer to add a characterizing ingredient to the product. This will lessen the likelihood of consumers being misled into believing that the advertised food contains everything needed to serve it.

Paragraph (b) allows the affirmative disclosures of nutrient content to be made for a serving of the combination as consumed, but prohibits a representation that the advertised food alone provides all the nutrients which are present in a serving of the combination. Since these foods are always combined when consumed, it is appropriate that the nutrient disclosures reflect the food as served.

To eliminate inflation of the advertised food's nutritional value through the disclosure provided by paragraph (b), paragraph (c) provides that if the food with which the advertised food is combined provides more than 50% of any nutrient named in the advertisement, it must be disclosed that most of that nutrient is provided by the other food.

Paragraph (d) treats a slightly different problem—foods which are frequently but not necessarily combined with other foods as consumed. In this situation, any nutrient claim or disclosure must be based on the advertised food alone. Breakfast cereals are examples of this type of food. Many of them presently provide such nutrient information on the boxes in which they are contained.

ISSUE

1. Should a food which is sometimes but not necessarily combined with another food be allowed to disclose the nutrients present in the combination so long as the nutrients present in the advertised food alone are disclosed with equal prominence? If so, should such additional disclosure be limited to print advertising, or be allowed in other media as well?

§ 437.8 Energy and calorie claims.

(a) *Claims that a food provides "energy" or "food energy".* This provision is intended to prevent consumers from being misled to believe that the terms "energy" or "food energy" mean anything other than calories, or that a claim that a certain food is a good source of "food energy" means that it is nutritious. Thus, each time that an energy claim is made, the proposed rule requires a disclosure of the fact that "energy" or "food energy" is supplied by calories and the number of calories contained in a serving of the advertised food.

(b) *Claims that a food or nutrient provides health, general vigor, sustained energy or alertness, or that energy from calories will produce strength, endurance, intellectual performance, or prevents fatigue.* This provision prohibits claims that a food, nutrient, or calories will alone determine a person's general well-being or vigor, since these traits are influenced by a number of factors including heredity, general physical and emotional status, and environmental stimuli. This paragraph is intended to deal only with claims directed at general or sustained health as opposed to claims of short-term contributions to vigor provided by a food covered by § 437.8(c).

(c) *Claims that a food enhances or contributes to vigor, alertness, energy, strength or endurance.* This provision prohibits claims that a food enhances or contributes to vigor unless it is disclosed that this vigor, etc. is enhanced by and depends, in part, on calories in the food, and the advertisement discloses how many calories are in a stated serving of the food. It is recognized that when a person is temporarily deficient in available calories, as during strenuous physical exercise, eating a food which is a good source of calories may contribute to strength, endurance, etc. Therefore such a claim is permitted if it is made in a proper context and the number of calories provided by a serving is disclosed. The point that such claims must be made in a carefully qualified manner should be particularly noted. Simple compliance with the requirements of this provision would not alone render an energy claim per se fair and nondeceptive.

(d) *Claims that a food or meal contributes to or is useful in regulating or maintaining calorie intake or body weight, or depiction of a food as a "diet" or "low calorie" food.*

This provision prohibits low calorie or diet claims unless the food conforms to applicable regulations of the Food and Drug Administration for foods which are low in calories. Revised regulations are presently being developed by FDA. Subparagraph (2) would require that the number of calories in a stated serving of the advertised food be disclosed. This is designed to allow consumers to judge for themselves how useful the food will be in a program of weight control.

ISSUES

1. Is adequate and proper exercise a sufficiently useful way of altering daily caloric balance as to require the men-

tion of this factor in advertisements for foods claiming to be useful in regulating or maintaining caloric intake or body weight?

2. Should advertisements for foods claiming to be useful in regulating or maintaining caloric intake or body weight be required to disclose, either alone or in addition to the disclosure presented in issue 1 above, that a reduction of total caloric intake should be combined with consumption of the advertised food?

(e) *Diet claims for foods containing artificial sweeteners.* This provision pertains to foods, such as "diet" soft drinks, which contain either only artificial sweeteners or a combination of artificial sweeteners and sugar. It requires disclosure of the number of calories in a stated equal-sized serving of the product with a nutritive sweetener so that the consumer can see how many calories he or she is getting in the food represented as a diet food. In addition, this regulation requires that a disclosure be made if the food does contain nutritive sweeteners so that diabetics who should not consume sugar are aware of the fact.

(f) *Representations that a food is "sugarless".* This provision is designed to prevent representations that a food is "sugarless" or similar representations unless the product in fact contains no sugars, including the sugar alcohols. It would prevent the possibility that diabetics and other persons who are attempting to avoid all forms of sugar are improperly misled.

§ 437.9 Fat, fatty acid and cholesterol content claims.

The Food and Drug Administration's nutrient labeling program strictly regulates the making of label claims regarding the fat, fatty acid and cholesterol content of foods. FDA prohibits any claim linking the consumption of a food to the prevention of coronary disease or to positive effects on existing coronary conditions. It is the Commission's understanding that the intent of the FDA regulations in this area is to eliminate any label representation which, in the absence of medical advice, would tend to confuse or mislead consumers about the relationship between cardiovascular disease and the consumption of foods which contain or do not contain fat, fatty acid, and cholesterol. FDA's regulation embodies the view that a consumer's physician—not the consumer alone—should make the judgment as to what, if any, dietary changes should be made to reduce the risk of heart or artery disease or related conditions. The staff would propose a rule consistent with FDA's provision on this subject (see Staff Statement of Fact, Law, and Policy). The Commission is concerned that this approach when applied to advertising may prevent the making of certain limited claims which are both accurate and beneficial, and the questions raised below are intended to explore whether or not this concern is justified.

ISSUES

1. What claims, if any, concerning food and heart or artery disease or any

attendant conditions or the fat, fatty acid, or cholesterol content of food, which are forbidden by 21 CFR 1.18 to be made in food labeling, should be permitted in advertising? Why should such claims be permitted in advertising but not in labeling? Is any such claim, even if literally true, likely to carry with it any additional implication(s) which would be deceptive or unfair?

2. Is there any claim concerning food and heart or artery disease or any attendant condition which is not forbidden by 21 CFR 1.18 and which should be allowed in food advertising?

§ 437.10 Health or related claims.

Nutrient labeling regulations of the FDA (21 CFR 1.17(d)) prohibit various claims which might distort the nutritive or medical benefits allegedly resulting from the consumption of a labeled food. Staff has proposed rule provisions which would apply FDA labeling prohibitions to advertising. The following questions are designed to elicit comment on the issue of whether, given the prohibitions established by FDA's nutrient labeling rule, any departure from these prohibitions is appropriate in the case of advertising.

Staff would further prohibit use of the general term "health food" on grounds that the term lacks definition and, therefore, is confusing and may deceive consumers into believing that a given food will, by itself, provide them with good health. Staff's proposal, however, would permit the making of specific positive nutrition claims about a food so long as the general requirements of the other provisions in Subpart B of the proposed rule are satisfied.

ISSUES

1. What claims, if any, concerning the nutritive or medical benefits allegedly resulting from the consumption of foods which are forbidden to be made in food labeling by 21 CFR 1.17(d) should be permitted in advertising? Why should such claims be permitted in advertising but not in labeling? Is any such claim, even if literally true, likely to carry with it any additional implication(s) which would be deceptive or unfair?

2. What, if any, is the proper definition of the term "health food"? If such a definition exists, is it generally accepted (among scientists or nutritionists; among consumers) or is there confusion, misunderstanding or disagreement about it?

3. What empirical evidence, if any, is there of consumer understanding of the term "health food"? If such evidence exists, does it show a consumer understanding consistent with any generally accepted definitions of those terms?

4. If the term "health food" cannot be defined in a manner which will eliminate consumer misunderstanding, should its use in advertising be prohibited?

EFFECTIVE DATE

180 days are allowed after final promulgation of the rule for all advertisers to bring their advertisements fully into compliance with the provisions of the rule.

STAFF STATEMENT AND AFFIRMATIVE DISCLOSURE

In addition to soliciting comment on the proposed rule, the Commission wishes to solicit comment on the Staff Statement of Fact, Law, and Policy as it relates to affirmative disclosure in nutrition advertising. All persons and organizations submitting comments and testimony concerning the staff statement are urged to address themselves to the issues set forth below and to propose specific disclosure schemes that would accomplish the purposes of the staff proposal together with detailed reasons why those specific proposals would be likely to be understood and utilized by a significant number of consumers. Each such proposal should also take into consideration the goal of minimizing interference with the basic format and design of food advertising.

The Commission views this portion of the proceeding as an opportunity for all interested persons to assist the Commission in an effort to evaluate the staff statement calling for industrywide disclosure requirements that will inform consumers of the nutritional worth of advertised food but will not unduly impede the advertiser's ability to promote a product in any truthful and fair way it chooses.

ISSUES

1. What evidence, including opinion, is there that bears upon the extent to which consumers want nutrition information in advertising, the extent to which such information can be understood and used by consumers, and the need for such information?
2. What is the relation between nutrition information in advertising and nutrition information in labeling? Should advertisements for foods which carry nutrient labels (either labels required by government regulation or voluntarily-placed labels) be required to include nutrient disclosures? Should such disclosures be limited to these foods?
3. What nutrition information should be disclosed in advertising?
4. Should the presence of specific nutrients be disclosed?
5. What nutrients should be disclosed? Should the percentage of U.S. RDA at which each such nutrient is present in a serving of the advertised food be disclosed?
6. Should nutrient disclosures be limited to nutrients for which a U.S. RDA

has been established? If not, what other nutrients should be disclosed?

7. Should nutrient disclosures be prohibited unless the nutrient in question is contained in a serving of the advertised food at or above a certain percentage of the U.S. RDA? If so, what percentage?

8. Should the number of calories in a serving of the advertised food be disclosed?

9. Should the serving size of the advertised food be disclosed?

10. Should any other nutrition information or ingredient information concerning the advertised food be disclosed?

11. Should the required nutrition disclosure be a reproduction of the required portion of the nutrient label? Should this always be allowed as an alternative disclosure?

12. Should the disclosures in television advertisements be required in the audio and/or video portions of the commercials?

13. Should minimum time periods be set for the audio and/or video portions of nutrition disclosures in television advertisements? If so, what should they be?

14. Should the required disclosures be different for foods without nutrient labels than for foods with nutrient labels? If so, how should they differ?

15. Should raw agricultural commodities be exempted from nutrition information disclosures? If so, why?

16. If specific nutrition information disclosure is not required, should a disclosure such as "For nutrition information, see the food label" be required for foods with nutrient labels? Would such a disclosure tend to imply that the food is of significant nutritional worth? What would be the likely impact of such a disclosure on consumers in motivating them to use nutrient labels?

17. Should advertisements for foods which do not contain any nutrients in an amount in excess of some specified percentage of the RDA be required to disclose that fact?

18. Can foods be ranked according to overall nutritional value, and could such rankings be communicated in advertising in lieu of specific information on the identities and amounts of nutrients?

All interested persons, including the consuming public, are hereby notified that they may file written data, views or arguments concerning the proposed rule and the subjects and issues set forth

in the Analysis and Statement of Issues by Section thereto by submitting twenty (20) copies thereof to William D. Dixon, Special Assistant for Rulemaking, Federal Trade Commission, Washington, D.C. 20580, not later than February 5, 1975.

All interested persons will also be given notice of an opportunity to orally present data, views, or arguments with respect to the proposed rule and the subjects and issues set forth in the Analysis and Statement of Issues by Section thereto at a public hearing to be held at a time and place to be announced at a later date and published in the **FEDERAL REGISTER**.

Each person desiring to orally present views at the later specified hearing will be required to inform the Special Assistant Director for Rulemaking in writing before a date which will be announced later (in advance of the hearing) and published in the **FEDERAL REGISTER**, stating the estimated time desired for an oral presentation.

Reasonable limitations upon the length of time allotted to any person will be imposed. In addition, each person desiring to deliver a prepared statement at the hearing (date and place to be announced) will be required to file twenty (20) copies of such statement with the Special Assistant Director for Rulemaking before a date which will be announced later (in advance of the hearing) and published in the **FEDERAL REGISTER**.

The data, views, or arguments presented with respect to the above-designated topics will be available for examination by interested persons in Room 130 of the Division of Legal and Public Records, Federal Trade Commission, Washington, D.C., and will be considered by the Commission in the establishment of a final Trade Regulation Rule.

All persons, firms, corporations or others engaged in food advertising in commerce, as "commerce" is defined in the Federal Trade Commission Act, may be subject to the requirements of any Trade Regulation Rule promulgated in the course of this proceeding.

Issued: November 7, 1974.

By the Commission.

[SEAL] CHARLES A. TOBIN,
Secretary.

[FR Doc.74-26140 Filed 11-8-74; 8:45 am]

FEDERAL TRADE COMMISSION FOOD ADVERTISING

Staff Statement of Fact, Law and Policy in Support of the Proposed Rule and in Support of Affirmative Disclosures in Food Advertising

This is a staff document which has not been adopted by the Commission.

I. INTRODUCTION

By Message of May 6, 1969, the President of the United States reported to the Congress that

"... In the past few years we have awakened to the distressing fact that despite our material abundance and agricultural wealth, many Americans suffer from malnutrition. Precise factual descriptions of its extent are not presently available, but there can be no doubt that hunger and malnutrition exist in America, and that some millions may be affected."

The President declared his intention to convene a White House Conference on food and nutrition. Thereafter, on June 11, 1969, work on the Conference began. In the words of the letter transmitting the Conference Report to the President:

A great deal of preliminary work was done during the summer and fall of 1969 by 26 panels and by eight task forces. The panels were made up of academic, medical, industry, and agriculture experts, as well as citizens chosen because of their particular concern rather than expertise. The task forces represented vast segments of our population such as social action groups, women's organizations, industrial and consumer interests, professional organizations, and religious denominations. All 800 or so participants in the preparatory work were highly conscious of their responsibility and spent considerable time in work and travel to insure that the 2,200 additional members of the Conference be provided with thoughtful and detailed provisional recommendations and background material.

"... [T]he membership of the Conference—and of each discussion group—was as broad as possible. University professors and students, physicians, old and young, industry leaders and technicians, representatives of consumer organizations, members of all main religious denominations and of minority organizations, members of women's organizations with membership totaling over 60 million women, labor leaders, representatives of health organizations, agricultural and trade organizations, social action groups from all economic levels ranging from the National Association of Manufacturers to various organizations dealing with the very poor—and last but not least, over 400 of the very poor themselves: black, Mexican-American, Puerto Ricans, white, Indians, Alaskan natives, inhabitants of the Pacific Trust territories, and of our Caribbean dependencies and migrant laborers were brought together to discuss the recommendations submitted to them by the panels and the task forces."

Pertinent to our discussion here, the Conference found that:

"White House Conference on Food, Nutrition and Health, Final Report 1 (1968). Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402. (Hereinafter cited as "White House Conference Report.")

"White House Conference Report, supra note 1, at 13.

Current problems are due—not to any shortage of nutrients—but rather to the following circumstances among others:

"... A substantial and serious lack of nutritional knowledge and/or motivation to use it on the part of many people including some members of the medical profession."

The section of the Conference Report prepared by the Panel on Popular Education underscored the causal link between the lack of nutrition information and malnutrition:

The panelists feel that one basic right of individuals in our society is the right to proper food. But in order to exercise this right effectively, every citizen must know enough about foods and nutrition to choose for himself those foods which will supply his nutritional needs.

It is clear that a great many of our citizens lack this necessary knowledge—both rich and poor, educated and uneducated—despite the great range and influence of our educational system, and our communications media. In fact, the gaps in our public knowledge about nutrition, along with actual misinformation carried by some media, are contributing seriously to the problem of hunger and malnutrition in the United States."

The portion of the Conference Report prepared by the subpanel on deception and misinformation elaborated on the panel's finding that consumers are seriously injured by misinformation as well as by lack of information. Sharply criticizing both oppressive marketing techniques and the Government's efforts to regulate those techniques, the panel reported that:

Many travesties cheat the public of enormous sums of money, and of good health as well. Yet the American people falsely believe they are well protected, both by Government and by the ethics of commerce.

In many cases, labels, advertising and packaging imply a quality, quantity or content that is false. Here those who cannot afford poor food choices are especially exploited. The poor, in particular the old, the ill and the least educated, are "... lured by advertising that suggests falsely that certain cheap, widely sold products, because they contain a few added vitamins or minerals, can replace usual foods or even whole meals."

The subpanel then detailed at length the inadequacy of past law enforcement efforts to protect consumers and called upon the responsible agencies to display new vigor and imagination:

It is strongly urged that the Federal Government constantly search for law and procedures that have not traditionally been thought of as weapons in the war against deception and misinformation, or which lately have been overlooked to some extent."

The proposed rule on food advertising, together with its supporting documents and this staff statement, is a response to the Conference's call for action to remedy deception in food advertising. It is also a response to developments since

the Conference which have emphasized the public interest in remedying deception and unfairness in food advertising. These developments are considered in some detail below.

II. THE MATERIALITY OF NUTRITION INFORMATION

Among the law violations to which the staff believes a trade regulation rule on nutrition advertising should be addressed are deceptive and unfair omissions from advertising of material information, omissions that violate sections 5 and 12, as defined by section 15, of the Federal Trade Commission Act.¹

While an explicit discussion of the materiality of a violation of the Federal Trade Commission Act is not ordinarily necessary to make out a case under section 5 of the Act,² such a discussion is useful in the analysis of a violation arising from the non-disclosure of information. Accordingly, this Statement will first establish the materiality of nutrition information before turning to the specific analyses of the alleged law violations.

The materiality of information arises from the need or the preference of consumers for the information and from their ability to apply it in their purchase or use decisions. Data on the extent of malnutrition, and on the risk of malnutrition, in America speak in varying degrees to each of these elements. Accordingly, discussion of the materiality of nutrition information should begin with a general consideration of that data.

There is a great deal of evidence indicating the existence of malnutrition problems in America. The concern voiced by the President and the White House Conference have already been cited in illustration of this point. From among many sources, further evidence of the problem of American malnutrition can be found in two comprehensive studies, the Ten-State Nutrition Survey³ and the First Health and Nutrition Examination Survey (HANES)⁴, which were undertaken precisely to define the scope of the malnutrition problem.

The Ten-State Survey was the first comprehensive attempt ever undertaken to assess the nutritional status of the American people.⁵ The Survey was created by the Department of Health, Education and Welfare following the express direction of the Congress that the prevalence, magnitude, and distribu-

¹ 15 U.S.C. Sections 45, 52, 55 (1970).

² See, e.g., "Developments in the Law-Deceptive Advertising," 80 Harv. L. Rev. 1056-1057 (1967).

³ U.S. Department of Health, Education, and Welfare, Health Services and Mental Health Administration, Ten-State Nutrition Survey 1968-1970. DHEW Publication No. (HSM) 72-8134. (Hereinafter cited as "Ten-State Survey.")

⁴ U.S. Department of Health, Education, and Welfare, Public Health Service, Preliminary Findings of the First Health and Nutrition Examination Survey, United States, 1971-1972. DHEW Publication No. (HRA) 74-1219-1. (Hereinafter cited as "HANES.")

⁵ Ten-State Survey, supra note 3, at I-9.

"White House Conference Report, supra note 1, at 102.

"White House Conference Report, supra note 1, at 179.

"White House Conference Report, supra note 1, at 190.

"White House Conference Report, supra note 1, at 194.

tion of malnutrition and related health problems within the United States be identified. To that end, demographic, dietary, clinical, anthropometric, dental, and biochemical data were gathered from primarily low income families in ten target states¹² plus New York City.

In the words of the survey report:

The results of the Ten-State Nutrition Survey indicated that a significant proportion of the population surveyed was malnourished or was at high risk of developing nutritional problems.¹³

Among the specific findings of the survey were evidence of general undernutrition among the elderly of every income and ethnic group,¹⁴ widespread deficiencies of riboflavin among blacks and the young of every ethnic group,¹⁵ subnormal hemoglobin for every age and ethnic group¹⁶ and marginal protein nutrition for a large proportion of pregnant and nursing women, a problem all the more tragic for its adverse impact on successful pregnancy and infant mortality.¹⁷

Striking data, illustrative of the survey's findings can be cited. In the five low income ratio states, i.e., those in which more than half of the families surveyed were near or below the poverty line hemoglobin levels, which are in part a function of iron intake, were judged low or deficient in 15.6 percent of whites surveyed, 37.4 percent of blacks, and 23.6 percent of Spanish Americans. When broken down by age groups, the data are even more disturbing: For example, for children under 2 years old, 19.2 percent of the white, 35.4 percent of the black, and 12.6 percent of the Spanish American had subnormal levels. If one turns to males over age 59, the percentages are 26.7 for whites, 65.2 for blacks, and 45.1 for Spanish Americans.¹⁸ Nor were these deficiencies limited to states with low-income survey populations: In the five higher income ratio states surveyed, i.e., those in which more than half the families surveyed were well above the poverty line, subnormal hemoglobin was still found in 9.3 percent of surveyed whites, 26.9 percent of blacks and 17.1 percent of Spanish Americans.¹⁹

Similar data were recorded for plasma vitamin A levels, which are a measure of the vitamin's long-term dietary intake. In the low-income ratio states surveyed 5.7 percent of examined whites, 9.0 percent of blacks, and 33.1 percent of Spanish Americans had subnormal levels.²⁰ For the high-income ratio states the figures were 7.5 percent of whites, 6.1 percent of blacks, and 2.3 percent of Spanish

Americans.²¹ And again, the age group data are striking: for example among low-income ratio state children age 2 to 5, 11.3 percent of whites, 21.2 percent of blacks, and 51.7 percent of Spanish Americans were low or deficient in plasma vitamin A.²²

In the words of the survey report,

The data indicate that vitamin A nutriture is a major public health concern among Spanish-Americans in the low-income-ratio states. The relatively high prevalence of low vitamin A values among young persons of all races suggests that these age groups should undergo continuous surveillance of vitamin A status.²³

In addition to biochemical measurements, dietary intake data, derived from survey respondents' reports of the foods they consume, were also employed by the Ten-State Survey as indicators of the adequacy of the survey populations' diets. Those data further support the conclusion that Americans have widespread malnutrition problems. For example, backing up the biochemical data indicating inadequate iron in the surveyed populations' diets is dietary intake data indicating that in the low-income ratio states surveyed, 88.8 percent of white, 93.5 percent of black and 76.2 percent of Spanish American females age 12 to 14 had dietary iron intakes below standard.²⁴ Figures on vitamin A intake likewise indicated inadequacies for substantial numbers in all three ethnic groups.²⁵ Again, as with the biochemical data cited above, this illustrative data is but a sampling of the Ten-State findings.

The second major survey substantiating and illustrating the problems of malnutrition in America is the HANES. A project of the National Center for Health Statistics, Department of Health, Education, and Welfare, the HANES was designed to comprehensively measure the nutritional status of the United States population and to monitor changes in that status over time.²⁶

Only the preliminary findings of the first HANES are available, but they further substantiate the disturbing findings of the White House Conference and the Ten-State Survey.

For example, dietary intake data indicate that over 90 percent of all children age 1-5 and females age 18-44 have diets deficient in iron. Likewise, the data also show for low-income females age 18-44 that 73.54 percent of the whites and 64.42 percent of the blacks have substandard vitamin A intakes, while for high income whites and blacks alike more than 50 percent age 60 and over showed substandard vitamin A intakes.²⁷

The preliminary report of the HANES biochemical data, as opposed to dietary intake data, is more optimistic about the state of the survey population's health, but it too confirms the prevalence of iron deficiency, and finds, for example, 9.08 percent of low-income black children

and 10.34 percent of high income black children deficient in vitamin A²⁸ and 13.17 percent of whites age 60 and over²⁹ and 13.67 percent of white females age 18-44 notably low in protein, among those persons surveyed who had income above the poverty level.³⁰

Also worth noting are data collected by a group of researchers who reviewed all studies published between 1950 and 1968 which contained dietary intake, biochemical or clinical evidence related to vitamin and mineral nutrition.³¹ Again significant data emerged involving malnutrition. For example, biochemical tests found that 35 percent of individuals studied were "below acceptable" levels for riboflavin, 12 percent were "low", and 25 percent were "deficient". For vitamin A the figures were 24 percent, 15 percent, and 9 percent; for vitamin C, 37 percent, 21 percent, and 18 percent.³²

Finally, trend data on the composition of American diets offers further cause for concern. The U.S. Department of Agriculture conducted a survey in the spring of 1965 on a nationwide sample of 7,500 households selected to represent housekeeping households in each of the four census regions.³³ The survey found that 50 percent of the households surveyed in 1965 had diets that were considered "good"—that is, they met the Recommended Daily Allowance for 7 nutrients. That figure was down from 60 percent in 1955. About 21 percent of the households in 1965 had diets which were rated "poor"—that is, supplied less than 2/3 of the Recommended Daily Allowance for one or more nutrients. That figure was up from 15 percent in 1955.³⁴ The report indicated that the nutrients most often in short supply were calcium, vitamin A and vitamin C. These nutrient shortages were associated with the use of less-than-recommended amounts of milk, milk products, vegetables, and fruit. Consumption of these foods declined from 1955 to 1965, while the consumption of soft drinks, punches, and prepared desserts rose sharply.³⁵

Although a greater percentage of households had "good" diets at each successively higher level of income, high income alone was no assurance of good diets: of those households with income of \$10,000 or more, 9 percent had poor diets, while 36 percent of those households with income under \$3,000 had poor diets.³⁶

These statistics provided by the USDA surveys most likely understate the ex-

¹² HANES, supra note 10, at 99.

¹³ HANES, supra note 10, at 161.

¹⁴ HANES, supra note 10, at 159.

¹⁵ Thomas R. A. Davis, Stanley N. Gershoff and Dean F. Gamble, "Review of Studies of Vitamin and Mineral Nutrition in the United States (1950-1968)," *Journal of Nutrition Education*, Volume 1, Number 2, Supplement 1, (Fall 1969).

¹⁶ Id., at 53. (Percentages cited are estimated from bar graphs.)

¹⁷ U.S. Department of Agriculture, Agricultural Research Service, *Dietary Levels of Households in the United States*, Spring 1965, U.S. Government Printing Office, Washington, D.C. 20402.

¹⁸ Id., at 1.

¹⁹ Id., at 2-3, 7.

²⁰ Id., at 5.

²¹ Ten-State Survey, supra note 9, at IV-144.

²² Ten-State Survey, supra note 9, at IV-141.

²³ Ten-State Survey, supra note 9, at IV-137.

²⁴ Ten-State Survey, supra note 9, at V-172.

²⁵ Ten-State Survey, supra note 9, at V-156, 157, 201, 202, 219, 220.

²⁶ HANES, supra note 10, at 1.

²⁷ HANES, supra note 10, at 19.

²⁸ California, Kentucky, Louisiana, Massachusetts, Michigan, New York, South Carolina, Texas, Washington, and West Virginia.

²⁹ Ten-State Survey, "Highlights", supra note 9, at 8.

³⁰ Ten-State Survey, "Highlights", supra note 9, at 10.

³¹ Ten-State Survey, "Highlights", supra note 9, at 12.

³² Ten-State Survey, "Highlights", supra note 9, at 11.

³³ Ten-State Survey, "Highlights", supra note 9, at 12.

³⁴ Ten-State Survey, supra note 9, at IV-10.

³⁵ Ten-State Survey, supra note 9, at IV-13.

³⁶ Ten-State Survey, supra note 9, at IV-141.

tent of nutritional problems in the households surveyed, since the data refer to the diets of the households rather than individuals, and, therefore, the nutrient intakes of those family members with the best diets are averaged with the intakes of those family members with the worst diets. This averaging process inevitably obscures instances of nutritional deficiencies.

One final issue related to malnutrition which is of concern to nutritionists and public health officials alike is the extent of obesity in the United States. The Ten-State Survey provides some relevant data on this issue. Over one-fifth of the white male population age 14 through 60 with income greater than 150 percent of the poverty level were diagnosed as being obese. Of the white females in the same age and income group, the percentage of individuals considered to be obese ranged from 9.3 to 41.5 percent. The percentages for blacks were also considerable. Obesity is definitely a problem for all age groups in this income category.²⁷

In addition to these substantial indications of nutritional inadequacies involving large numbers of consumers, two other aspects of food and nutrition give further emphasis to the critical importance of individual decisions concerning the choice and consumption of foods, thereby further emphasizing that consumers need nutrition information.

First, some essential human nutrients must be consumed in their proper amounts almost daily in order to prevent deficiencies. Fat soluble nutrients, such as vitamin A, can be stored in the body in times of nutrient plenty and can be mobilized in times of nutrient poverty. But water soluble nutrients, which include the majority of vitamins, and among which is vitamin C, are not generally stored in the body for any great length of time. Thus, unless each day's diet, by chance or by intent, is adequate in its content of water soluble nutrients, a risk of deficiency may be present.²⁸

The second consideration illustrative of the substantial injury which can attend improper food decisions—and, therefore, of the need for nutrition information—concerns the cost of food. Findings by the Federal Trade Commission made in 1971 and based on earlier data established that food costs are both high and sharply regressive, imposing the heaviest percentage burden on the poorest of families. The Commission found that 17 percent of the average family budget went to food and that for families with a disposable family income of \$3,000 a year or less, the figure rose to 40%.²⁹

In an era of rising food costs the impact of food purchases on the family budget is now of even greater concern. This concern can be expressed in two

ways: First, the data on malnutrition taken with the data on food cost illustrate how important it is that very limited family financial resources be carefully spent so as to maximize the nutritional value of food purchases. Secondly, the data are a basis for concern that even families that are adequately nourished may be paying too high a price for their nourishment. For as discussed below, there is reason to believe that consumers may seek satisfaction of their nutritional needs from high cost (and in this sense, inefficient) sources of nutrients. To the extent, then, that from ignorance consumers are spending more than they need on food, they may be suffering serious economic injury. Further, to the extent that ill-informed expenditures on food are made at the expense of expenditures on other means of protecting the family's health, such as medical and dental care, then consumers' physical health is being injured as well. These considerations emphasize the importance to the well being of consumers of food purchase decisions which on a day-to-day basis are nutritionally accurate and therefore economically efficient.

A variety of data indicate that a significant portion of the malnutrition problem just discussed in large part arise from consumers' lack of awareness of the health significance of food choices and of the importance of nutrition and lack of information about the nutritive value of foods they buy.

As noted earlier, the White House Conference Report repeatedly attributes malnutrition not to an overall shortage of available nutrients but rather to, among other reasons, a lack of nutrition knowledge on the part of consumers and actual misinformation disseminated in advertising and other communications media.

Likewise, there should be recalled here the evidence presented by the 1965 USDA survey that changing patterns of food consumption are apparently leading to a deterioration of the American diet. While other factors may, in part, be at work, such changes are fairly attributable, in part, to decisions made by consumers who are unaware of the impact of their changing patterns of food consumption on the adequacy of their diets.

The Ten-State Survey, discussed above, lends at least inferential support to the proposition that lack of nutrition knowledge is contributing to current malnutrition and directly asserts that consumers are paying substantially more than is necessary to obtain needed nutrients:

There was evidence that many persons made poor food choices that led to inadequate diets and to poor use of the money available for food. In particular, many households seldom used foods rich in vitamin A. Also, there was a heavy emphasis on meat in many diets, rather than use of less expensive but excellent protein sources such as fish and poultry, or legumes and nuts.³⁰

It is reasonable to assume—particularly since many of the inadequate diets were found in low and moderate income

households—that the poor food choices noted in the Ten-State Survey were often due to a lack of nutrition information and were not exclusively due to other factors.

The premise that consumers need nutrition information is further illustrated by findings of the Commissioner of the Food and Drug Administration. In the preamble to the proposal of the nutrient labeling program, the Commissioner made plain his determination that,

The increasing number of processed and formulated foods makes it difficult for consumers to identify the nutritional qualities of the products they purchase.³¹

Thereafter, the Commissioner spoke further on the matter of remedying malnutrition. Addressing the American Association for the Advancement of Science, the Commissioner listed in order of their priority to FDA the six basic hazards associated with foods. First on his list was food borne disease, including botulism, salmonella, and the mycotoxins. He then turned to his next concern:

In terms of importance, the second group of food hazards is malnutrition. While the potential for fatal consequences may be remote in the United States, nevertheless the incidence of nutritional deficiencies in the United States is provable and numbers in the millions. And these millions are not counted among the poor alone. It is a problem crossing all social and economic boundaries, often because of our national penchant for fads.

The solution, as we see it, will come through individual consumers making better choices based on better information about the nutritional values available in the foods they buy.³²

The need of consumers for nutrition information can thus be seen in the evidence of malnutrition, of unnecessary expenditures in instances where needed nutrients are being obtained, and of the lack of information contributing to malnutrition. The materiality of nutrition information can also be found in the evidence that consumers are capable of using nutrition information, and do express a desire to receive it.

Studies bearing on these issues have been reviewed by the Food and Drug Administration, and a summary of the studies' results, demonstrating that consumers can and do use nutrition information, has been published by the Commissioner as part of his proposal of the nutrient labeling program.

The studies provide substantial support for the conclusion that consumers are competent users of nutrition information. The proposed Rule to which this Statement pertains requires the disclosure of nutrition information in advertising. It is recognized that these studies involved information provided in a label, catalog, or survey questionnaire, and that a requirement for nutrition information in other media, particularly broadcast media, raises questions not

²⁷ Ten-State Survey, supra note 9, at III-45. Diagnoses of obesity were made by measuring the thickness of fat at the back of the upper arm.

²⁸ HANES, supra note 10, at 3-4.

²⁹ Statement of Basis and Purpose, Trade Regulation Rule for Retail Food Store Advertising and Marketing Practices, 16 (1971) 36 Fed. Reg. 8777, 8780.

³⁰ Ten-State Survey, "Highlights", supra note 9, at 10.

³¹ 37 FR 6493 (1972).

³² Address by FDA Commissioner Schmidt, "The Role of the FDA in Food Safety", AAS Symposium on Food Safety and the Organic Food Myth, Feb. 25, 1974, San Francisco, California.

fully answered by these studies. The studies do show, however, the understandability of nutrition information, even if they do not fully establish the ability to communicate the information in all other media. Thus, they do further establish the materiality of nutrition information. The specific propriety of this information being required to appear in advertising disclosures will be discussed subsequently in this Statement.

The first study, reported by the magazine *Chain Store Age* in 1965, proposed consumers to a selection of products, some of which fully disclosed their nutrient and calorie content. The study found slight but perceptible shifts in consumer preferences toward the brands with full disclosure labels, and in some cases, shifts of over 10% occurred.³⁷

Following this study, the Food and Drug Administration contracted with the Consumer Research Institute to research consumer understanding and use of nutrition labeling. CRI then engaged in a two-phase test. The first phase used a panel of 950 educated middle-class Connecticut and Georgia households who purchased their groceries from a catalog. The conclusions relevant to this discussion reached by CRI were:

1. Nutrient information was used by the consumers observed in this study. This is demonstrated by the fact that their purchase patterns changed after the introduction of nutrient labeling.
2. In situations where a product or brand has a real nutritional advantage over its competitors, there was a major change in that product's share of the market.
3. The consumers' attitudes toward nutrition were found to be rather high before the introduction of nutrition labeling. The changes in attitude were positive but small, since the consumers in the test panel already had very positive attitudes about nutrition.
4. There was a considerable increase in the consumers' knowledge of nutrition, especially in their awareness of vitamins and minerals.³⁸

In the second phase of the CRI study, mailed questionnaires and personal interviews were employed to assess the abilities of a national sample and of a low income sample in dealing with nutrition information presented in varying formats. Three formats were used: One format employed percentages of the Recommended Dietary Allowance at which nutrients were present in the food; the next employed adjectival descriptions of foods' nutrient contents; and the third employed representations of foods' contents by pictorially expressed units.

No matter which format was employed, nearly 80 percent of the national sample could successfully employ the nutrition information to pick the more nutritious food from among the test foods presented. For the low income sample responding to a questionnaire, about 70 percent correctly selected the more nutritious food when using the percentage format and 66 percent were still able to deal correctly with adjectival information. When 600 low income con-

sumers were personally interviewed (and, hence, as the survey recognized, presumably better motivated to make their decisions carefully), 90 percent could make correct product choices using any of the three formats.³⁹

Tests were also conducted with the cooperation of a number of food chain stores with two of the tests being evaluated for the Food and Drug Administration by Cornell University. A preliminary test in the evaluation program of a random sample of chain store customers before the labeling experiment began found 70 percent able to use the information correctly in selecting more nutritious foods. Twenty weeks later, after most consumers had presumably acquired some experience in working with the stores' new nutrient labeling, 80 percent of tested consumers were able to deal with the information correctly.⁴⁰

The Commissioner of Food and Drugs found:

The information provided in the various labeling formats was used by consumers. The questionnaire studies indicated that consumers, including those with low incomes and with less than a high school education, were able to understand and use nutrition labeling.⁴¹

Since malnutrition problems are so widespread, and since consumers have the facility to use nutrition information, it is not surprising that consumers explicitly express their desire to receive such information. Consumer representatives, nutrition educators, and nutritionists have addressed the Federal Trade Commission, calling for the provision of nutrition information in advertising, and the Commissioner of the Food and Drug Administration has noted the many requests by consumer groups that such information be made available in food labeling.⁴² The chain store tests just noted found similar preferences expressed directly by consumers. In one chain store test, the majority of consumers asked that the store's nutrition labeling program be continued. In a second store's test, only three consumers out of several hundred responding opposed nutrition labeling, and they only because they feared it would lead to higher food prices.⁴³

The CRI study also measured consumer preferences. Surveyed homemakers were asked what most concerned them in the daily care of their families: that they washed and bathed regularly; brushed their teeth; ate proper foods; or got to school and work on time. Prior to their introduction to the experimental labeling program, 74.4 percent identified proper foods as their first concern, and after experience with the information disclosures, the percentage rose to 78.8.⁴⁴ Finally, and most strikingly, in

the Cornell University evaluation of the early chain store experiments, 97.6 percent of consumers surveyed agreed that it was a consumer's right to have nutrition information on food products.⁴⁵

The simple fact that information may bear only on the exercise of personal preferences of a portion of the purchasing public for, say, lubricants refined from virgin crude oil, is sufficient cause to find that information material.⁴⁶ Thus the very fact that consumers desire nutrition information and may weigh it in making purchase and use decisions is sufficient to establish that information's materiality. The Commission, however, has substantial additional grounds for acting here. Since many consumers face substantial nutrition problems, either because they are malnourished or are at risk of malnourishment, and since consumers not only want nutrition information but can use nutrition information and use it with increasing accuracy even after a short period of practical experience, it is evident that the materiality of nutrition information is established, and, moreover, its provision to consumers as a remedy for deceptive and unfair advertising is very much in the public interest.⁴⁷

III. THE FAILURE TO DISCLOSE NUTRITION INFORMATION IN ADVERTISING IS DECEPTIVE

It is well established by case law that deception actionable under section 5 of the Federal Trade Commission Act⁴⁸ can arise from the silence of the advertiser as well as from his affirmative representations.⁴⁹ Furthermore, in the case of food, section 15 of the Federal Trade Commission Act explicitly establishes as a violation of law the omission of facts material in light of affirmative claims made for the food or in the light of the consequences of use of the food:

The term "false advertisement" means an advertisement, other than labeling, which is misleading in a material respect; and in de-

³⁷ 37 FR 6496 (1972).

³⁸ *Kerran v. F.T.C.*, 265 F.2d 246, 248, (10th Cir. 1959), cert. denied, sub nom. *Double Eagle Refining Co. v. F.T.C.* 361 U.S. 818 (1959) ("But the public is entitled to know the facts with respect to lubricating oil sold by the petitioners being produced from previously used oil and then make its own choice with respect to purchasing such oil or oil produced from virgin crude; even though the choice is predicated at least in part upon ill-founded sentiment, belief, or caprice.")

³⁹ Data on how nutrition information affects use, as distinguished from purchase, decisions is not presently available. There is, however, data showing that interest in advertising for a product may actually increase after purchase of the product. Since daily intake of many vitamins is advisable, not only purchase, but also daily use decisions, as, for example, in selecting several foods to serve as a meal, are of very great consequence to the adequacy of each day's total diet. Thus, information bearing on those decisions if contained in advertising can come to the attention of a consumer at a time when critical, daily use decisions concerning the already purchased food are being made.

⁴⁰ 15 U.S.C. 45 (1970).

⁴¹ See, e.g., *Fisher & DeRitis*, 49 F.T.C. 77 (1952); *Stuppell Enterprises, Inc.* 67 F.T.C. 173 (1965); *Bantam Books, Inc. v. F.T.C.* 275 F.2d 680 (2nd Cir. 1960), cert. denied, 364 U.S. 819 (1960).

⁴² *Id.*, at 6495.

⁴³ *Id.*, at 6495-6496.

⁴⁴ *Id.*, at 6496.

⁴⁵ *Id.*, at 6494.

⁴⁶ *Id.*, at 6435.

⁴⁷ Raymond C. Stokes, Rafael Hadock, *Interim Report Of The First Two Phases Of The CRI/FDA Nutritional Labeling Research Program* 30 (1972). Consumer Research Institute, Inc., Washington, D.C. 20006.

³⁷ 37 FR 6494 (1972).

³⁸ *Id.*, at 6495.

termining whether any advertisement is misleading, there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, sound, or any combination thereof, but also the extent to which the advertisement fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual."

The advertiser need not have taken any affirmative action to create consumer misbeliefs: A violation of law is established if the advertiser is silent about a material fact concerning which consumers may make erroneous assumptions."

Likewise, it is sufficient that an advertisement has a tendency or capacity to deceive: actual deception need not be shown." Thus, in the case of deception by silence, the misbelief need not always be at the forefront of the consumer's thinking at the time of purchase; rather, a violation may be made out even if consumers' erroneous assumptions are unfocused or inchoate."

Cases finding deception by silence have ranged from those where consumers might incur minor economic injury" or the frustration of a mere preference that lacked any apparent rational basis in fact" to where physical safety or life

was endangered."

In determining whether there exists a capacity to deceive, the Commission is to view the representation through the eyes of the general public,

"... that vast multitude which includes the ignorant, the unthinking and the credulous, who, in making purchases, do not stop to analyze but too often are governed by appearances and general impressions"

and not through those of a "reasonable man" who carefully analyzes the claims made." Likewise, in assessing the legality of an advertisement, it has been held that if the advertisement is capable of two meanings, one of which is false, then the advertisement is deceptive."

Traditionally, the representations or omissions with which the Commission has been concerned have been those which might deceive consumers into the purchase of products or services; however, several recent trade regulation rules find actionable deception based on a capacity to deceive those who have already purchased goods and services as well as prospective purchasers."

There having been set out the basic standards used in applying sections 5 and 12, as defined by section 15, of the Act, it should next be noted that in the case of food advertising, these standards are applicable with particular strictness for at least four reasons.

First, as has been seen, food, and information about food, has a major impact on consumers' health. The lesson

of Rodale Press" and the Cigarette Rule," *inter alia*, is that when advertising impacts health the Commission will hold the advertiser to a very high duty of care.

Second, because food has a tremendous impact on the average family budget and a powerfully regressive impact on the economic well being of the very poor, the potential scope of injury is unusually great."

Third, food advertising is often directed, at least in part, to especially susceptible audiences—children, the poor, the elderly—and must therefore be judged in the light of the ability of these audiences to deal with and understand the full implications of the advertising."

Fourth and finally, the food industry's history of massive and forceful advertising has given the industry tremendous influence in the market place over consumer purchase and use behavior. Possession of such power places an advertiser under a special duty of fair dealing towards consumers, especially since food products are so directly and intimately linked to consumers' health and economic well being."

To this point, the materiality of nutrition-related claims and information and standards applied in determining violations of sections 5 and 12, as defined by section 15, of the Federal Trade Commission Act have been discussed. In the light of the materiality of nutrition information and the application of the standards of deception of food advertising, it may be concluded that the failure to provide nutrition information in food advertising is a deceptive practice in violation of sections 5, 12, and 15 of the Federal Trade Commission Act."

"Rodale Press, Inc., 71 F.T.C. 1184, 1239, 1241 (1967), vacated and remanded on other grounds, *Rodale Press v. F.T.C.*, 407 F. 2d 1252 (D.C. Cir. 1968).

"Trade Regulation Rule For The Prevention Of Unfair Or Deceptive Advertising And Labeling Of Cigarettes In Relation To The Health Hazards Of Smoking And Accompanying Statement Of Basis and Purpose Of Rule 93-94 (1964), 29 FR 8353-8354 [Hereinafter cited as "Cigarette Rule"] ("the seller of a product whose use may cause personal injury is held to a more stringent standard of truthfulness in advertising than other sellers. As to this, the Commission not only may, but must, insist upon the most literal truthfulness" (*Moretrench Corp. v. F.T.C.*, 127 F. 2d 792, 793 (2d Cir. 1942)), and resolve all ambiguities and interpretive uncertainties against the seller.").

"See text at note 39, *supra*.

"S.S.S. Co. v. F.T.C., 416 F. 2d 226, 228, 231 (6th Cir. 1969) [urban and rural poor]; *Mather Hearing Aid Distributors, Inc.*, 78 F.T.C. 709, 734 (1971) [elderly]; *Stupell Enterprises, Inc.*, 67 F.T.C. 173, 186-87 (1965) [children]; *Personal Drug Co.*, 50 F.T.C. 828, 834 (1954); *aff'd per curiam*, sub nom. *Savitch v. F.T.C.*, 218 F. 2d 817 (2d Cir. 1955).

"This point is discussed more fully below in the text accompanying notes 95 to 99.

"As will be seen below, the provision of nutrition information in food advertising is a remedy not only necessary and appropriate to the violation just described but is also an appropriate partial or complete remedy to other acts and practices consisting of affirmative claims which are in themselves, quite apart from the deception just described, illegally deceptive.

"15 U.S.C. 55 (1970).

"Manco Watch Strap Co., Inc., 60 F.T.C. 495 (1962); *Mohawk Refining Corp.*, 54 F.T.C. 1071, 1077 (1958). "The appeal also contends that no power is conferred under the act to require revealing statements in cases of nondisclosure unless the challenged practice also is accompanied by false statements or affirmative misrepresentation pertaining to the articles offered. This legal concept is erroneous. The Commission has plenary power to require affirmative disclosure of material facts in situations where seller silence results in deception of purchasers." [citations omitted], *aff'd*, *Mohawk Refining* 1959), cert. denied, 361 U.S. 814 (1959).

"Charles of the Ritz Distributor Corp. v. F.T.C., 143 F.2d 676, 680 (2d Cir. 1944).

"Manco Watch Strap Co., Inc., 60 F.T.C. 495, 508 (1962), speaking of a deceptive silence concerning a product's foreign origin: "Further, there is a wealth of testimony here that, in the absence of any disclosure of the country of origin on the packages containing the watch bands, many purchasers will—if, indeed, they think about it at all—assume that the bands were manufactured in the United States."; *Stupell Enterprises*, 67 F.T.C. 173, 187 (1965): "We merely apply to the facts here the well-established rule that where breakage is likely to occur in the normal use of the product, and the hazards of such breakage are not apparent or obvious, at least to many consumers, non-disclosure of such risk is deceptive and therefore unlawful." "... most consumers expect and assume, in the absence of some indication to the contrary, that a product marketed to the general public is safe for the use for which it is sold."

"Bantam Books, Inc. v. F.T.C., 275 F.2d 680 (2d Cir. 1960), cert. denied, 364 U.S. 819 (1960) [abridged or retitled paperback books].

"Kerran v. F.T.C., 265 F.2d 246 (10th Cir. 1959), cert. denied, sub nom. *Double Eagle Refining Co. v. F.T.C.*, 361 U.S. 818 (1959) [re-refined oil].

"Stupell Enterprises, Inc., 67 F.T.C. 173 (1965) [goggles may fail to protect users' eyes from injury]; *Fisher & DeRitis*, 49 F.T.C. 77 (1952) [inflammable sweaters].

"Aronberg v. F.T.C., 132 F.2d 165, 167 (7th Cir. 1942).

"While affirmative claims of the advertiser may be illegal if they have a capacity or tendency to deceive the "unthinking", the Commission may, as a proper exercise of its power both to define and to remedy deception and unfairness, require the disclosure of information which may well not be utilized by the "unthinking" but will be utilized by many other consumers. With respect to affirmative claims, it may be precisely the "unthinking" who are most in need of protection; with respect to the disclosure of information, it would be improper to deny information to the reasonable consumer—thereby allowing deception and unfairness to continue as to him—on the grounds that not all consumers will be able to use or be interested in using the information.

"Rhodes Pharmaceutical Co. v. F.T.C., 208 F. 2d 382, 387 (7th Cir. 1953), modified on other grounds, 348 U.S. 940 (1955).

"Trade Regulation Rule: Care Labeling of Textile Wearing Apparel 22-23 (1972). [Hereinafter cited as the "Care Labeling Rule"] 36 FR 23889. Trade Regulation Rule Respecting Failure to Disclose the Lethal Effects of Inhaling Quick-Freeze Aerosol Spray Products Used for Frosting Cocktail Glasses, 16 CFR 417, 34 FR 2417, 4 CCH Trade Reg. Reporter par. 38,022 (1969); Trade Regulation Rule Respecting Failure to Disclose that Skin Irritation May Result From Washing or Handling Glass Fiber Curtain and Draperies and Glass Fiber Curtain and Drapery Fabrics, 16 CFR 413, 32 FR 11023, 4 CCH Trade Reg. Rptr. par. 38,019 (1967); Trade Regulation Rule Respecting Deceptive Use of "Leak-proof," "Guaranteed Leakproof," etc., as Descriptive of Dry Cell Batteries, 16 CFR 403, 29 FR 6533, 6536, 4 CCH Trade Reg. Reporter par. 38,014 (1964).

In the statement of Basis and Purpose for the Care Labeling Rule, the Commission said:

"[I]t is deceptive not to reveal care instructions when silence on this subject can either mislead the public into using a care procedure which is harmful, or frustrate a basic assumption inherent in the initial purchase—that no special and costly maintenance will be required, and that the consumer will be able to distinguish between the whole range of possible care procedures and use the procedure which is both most effective and most economical."

This passage describes a violation of law to which the omission of care instructions is central. Consumers, basing their action on such data as the appearance of garments and the often ill-informed advice of cleaners and salespeople, often assumed that a given care procedure might be appropriate to a given garment when in fact the procedure would be inappropriate and damage the garment or, if not damaging to the garment, all the same unnecessarily expensive and, hence, uneconomical and injurious to the consumers. Although manufacturers of the garment did not always directly benefit from this type of consumer ignorance, and although some manufacturers might not engage in affirmative acts creating or enhancing consumers' confusion, other than by participating in the marketing of a variety of garments made with a variety of materials, many of them being artificial materials about which consumers and service personnel had little traditional knowledge, manufacturers of garments were held to be in violation of the Federal Trade Commission Act since their silence left undisturbed material and erroneous assumptions consumers were making concerning the proper post-purchase care of garments.

Very much the same considerations apply in the case of food advertising except that arguably food, even more than clothing, is of central importance to consumers' health and finances. To paraphrase the Care Labeling Rule:

It is deceptive not to reveal nutrition information when silence on this subject can either mislead the public into using food in their diet in a way which is nutritionally harmful or inadequate, or frustrate a basic assumption inherent in the initial purchase that the consumer will be able to distinguish between the whole range of nutrition values and characteristics of foods, and use those foods and daily patterns of consumption of foods which are most nutritionally effective and economical."

Just how silence on the subject of nutrition can mislead the public in the ways asserted above can be seen by considering the number of ways in which consumers can make erroneous assumption and decisions about food:

(1) A consumer may assume a given food plays a nutritionally valuable, or nutritionally harmless, role in his diet, when, in fact, given the particular circumstance of the consumer or the nutritional characteristic of the food this is untrue. An example would be a weight-conscious consumer purchasing

a food which is much higher in calories and lower in essential nutrients than the consumer assumes. Since the very act of unqualifiedly advertising a food to consumers represents the food as being appropriate for inclusion in the consumers' diets, this example illustrates, as do many of the following examples as well, a case coming within the definitions of section 15 of the Act requiring the disclosure of information material in the light of the consequences of use of the product.

(2) Consumers may assume that their choice of foods and their organization of foods into a diet does not have any particular significance for their health, when, to the contrary, good nutrition is necessary to good health.

(3) Consumers may assume that if they eat a reasonably varied diet, they need not have any conscious concern that they are receiving an adequate supply of all needed nutrients. But as shown above, some nutrients need be consumed daily and major segments of the population are short on one or more nutrients. Increasing consumers' knowledge about the actual value of the foods they consume will help correct this type of misbelief.

(4) Consumers may assume that most foods or a large number of foods of a certain type contain so large a number of nutrients in such significant amounts that consumption of these foods will adequately balance or help balance the diet, when in fact this is not true.

(5) In a related fashion, consumers may likewise erroneously assume that consumption of widely advertised foods, or foods with which they and their families have traditionally been familiar, or foods which may be similar to such familiar foods, may adequately insure a balanced diet.

(6) It may be assumed that certain foods contain a certain nutrient or are the best or only source of that nutrient when such is not the case. As cited above, survey evidence shows that consumers rely upon meat to satisfy their protein needs. They may be unaware that less expensive foods can provide necessary protein."

(7) It may be assumed by consumers that their diet is deficient in some nutrients and that consequently food supplements, special foods, or increased consumption of certain foods is necessary when this simply is untrue. This misbelief and the misbelief cited under (6) take on added significance in light of the heavy and regressive burden food costs impose on the family budgets of the poor, for it is apparent that very substantial injury may flow from unnecessary food purchases. This same concern, and especially that the poor may be paying too much to obtain goods of adequate quality, was one basis for the Octane Rule."

(8) Consumers may assume that foods which resemble one another are comparable in their nutrients and calories when they are not. The difference in nutrients and calories among processed or imitation foods and the traditional foods they resemble and among closely related varieties of traditional foods can be very great and quite beyond the reasonable expectations of most consumers.

(9) Finally, a variety of affirmative representations are made in food advertising which, unqualified by nutrition disclosures, can be seriously misleading. An example would be an advertisement that emphasizes the unusually high content of one nutrient

in the advertised food but fails to disclose the unusually low content of all other nutrients.

These examples are not unrealistic, and it is evident that food advertising which fails to reveal nutrition information has the capacity or tendency to mislead many consumers in the manner indicated by the examples. As has been discussed above, the White House Conference found that the poor are often led by advertising into the misbelief that certain fortified foods are an adequate substitute for some nutritious foods or even whole meals," and the Commissioner of the Food and Drug Administration found that the increasing number of processed foods make it difficult for consumers to identify the nutritional qualities of foods." A Daniel Yankelovich survey found that in the absence of any information to the contrary from some authoritative source, consumers believe that heavily advertised name brands are good products and universally high in nutrient value."

Moreover, the audience for food advertising is nearly synonymous with the consumers of food and, therefore, nearly universal in its composition. Thus, it must of necessity include substantial numbers of consumers with only very modest intellectual, educational, and experiential skills. Given this audience and given the evidence of consumer malnutrition, of poor consumer food choices, and of the enormous variety of foods produced by modern technology, it is inevitable that the basic misbeliefs identified above, and many more misbeliefs besides, are widely held by large numbers of consumers in the audience for food advertising. The endless combinations in which nutrients and calories occur in foods make it all the more unavoidable, absent the provision of specific nutrition information, that large numbers of consumers will be misled to the detriment of their health and economic well being.

Moreover, the findings of the White House Conference Report and the nutrition studies starkly illustrate that ill-advised consumer food choices, in part attributable to the absence of nutrition information, are a major cause of malnutrition. Finally, the findings that consumers want nutrition information, and can use it correctly, all go to establish that information about the nutritional value of foods is highly material to the purchase and use behavior of many consumers. Moreover, these findings provide strong indications that the widespread and frequent disclosures of nutrition information in advertising would increase the number of consumers to whom such information is material.

In light of all the above considerations, it is apparent that it is deceptive under sections 5, 12, and 15 of the Federal Trade Commission Act not to reveal nutrition information in food advertising, since such information is material and could correct erroneous assumptions

" See text accompanying note 38, supra.

" See text accompanying note 40, supra.

" Trade Regulation Rule Including A Statement Of Its Basis And Purpose: Posting Of Minimum Octane Numbers On Gasoline Dispensing Pumps (1972). 36 FR 23878 [Hereinafter cited as the "Octane Rule"].

" See text accompanying note 4, supra.

" See text accompanying note 41, supra.

" Daniel Yankelovich, Incorporated, Effects Of Nutritional Labeling On Food Purchasing, prepared for Chain Store Age, (October, 1970).

" Care Labeling Rule, supra note 66, at 22-23, 36 FR 23889.

" Cf., Care Labeling Rule, supra note 66, at 22, 36 FR 23889.

concerning the nutritional value or lack of value of foods, assumptions which affect both the purchase of food and its use. This conclusion is strengthened by the recognition that food choices affect health; that food is a necessity and is regressive in its economic impact, taking a far higher share of low incomes than of middle and high ones; that the audience for food advertising is nearly universal and, therefore, includes many consumers of modest or low intellectual ability; and that the aggregate volume of food advertising creates a substantial degree of power over food choices; all of which, as argued earlier, make appropriate the imposition of particularly high standards in defining deception under sections 5, 12, and 15.

IV. THE FAILURE TO DISCLOSE NUTRITION INFORMATION IN ADVERTISING IS UNFAIR

The Courts have long recognized the Commission's broad authority to deal with unfair practices even though those practices are not deceptive, anticompetitive nor traditionally forbidden at common law.¹ Indeed, in deciding a case where respondent sought to limit the Commission's unfairness powers to matters of competitive injury, the Supreme Court likened the Commission to an equity court, saying:

[L]egislative and judicial authorities alike convince us that the Federal Trade Commission does not arrogate excessive power to itself if, in measuring a practice against the elusive, but congressionally mandated standard of fairness, it, like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws.²

Silence that unfairly harms the economic interests of consumers has with some frequency been the subject of Federal Trade Commission Trade Regulation Rules. From an examination of four such rules—Care Labeling,³ Octane,⁴ Incandescent Lamps,⁵ and Cigarettes⁶—the factors which may move the Commission to find unfairness in the failure to disclose information may be readily identified.

The Care Labeling Rule dealt with the needs of consumers who, faced with an enormous variety of clothing and fabrics, including many products made by non-traditional processes and/or from non-traditional materials, could not determine how to provide proper and economical care for the clothing they purchased,⁷ and could not comparison shop on the basis of economy of care.⁸ The

Commission found that under these circumstances care disclosures were required because "it is unduly oppressive and unfair to consumers to withhold information essential to the ordinary use of products."⁹

The Octane Rule likewise began with findings that consumers needed essential product information. In this instance, consumers faced a great variety of grades and brands of gasoline, and, absent octane disclosures, they could neither relate gasoline varieties to their automobile requirements so as to avoid engine damage nor price shop for gasoline.¹⁰ Lacking octane information, consumers often purchased gasoline of higher expense and octane quality than their automobiles required.¹¹ Again, the Commission found that, under the circumstances, failure to disclose octane values was an unfair trade practice and so ordered their disclosure.¹²

Although the Statement of Basis and Purpose for the Incandescent Lamps Rule did not expressly invoke the statutory term "unfair," that Rule also dealt with a case where consumers, lacking basic product information, could not relate available products to their preferences and needs.¹³

At issue in these three rules was the ability of consumers to make basic determinations concerning the product and its value, the specific uses for which it is suited, its specific relation to the consumers' particular preferences or needs, or basic considerations involved in its proper use such as the care appropriate to it. Unfairness may thus arise when, due to the absence of information about the nature of the product, consumers cannot make these types of basic determinations concerning the product.

As the preceding sections of this Statement have shown, nutrition information is material to consumer use and purchase behavior, and, absent nutrition information, consumers cannot make basic determinations concerning food products. These facts alone are sufficient to establish the unfairness of withholding nutrition information in food advertising. Indeed, insofar as injury or the risk of injury to consumers is an important component of unfairness, the withholding of nutrition information in food advertising presents a more compelling instance of unfairness than was present in the rules which have been discussed. The individual losses associated with the purchase of unnecessarily expensive gasoline, or a lightbulb too dim or too short lived, did not, unlike unwise food choices, affect health at all.

The Commission has recognized that a special duty of fair dealing is particularly appropriate where the advertised

product involves danger to human health.¹⁴ While nutritionally unwise food choices do not ordinarily pose an imminent danger to health, they quite clearly do affect health adversely if they are habitual.

Particularly because food bears upon health, is a necessity and is a major item in the ordinary consumer's budget, the staff concludes that it is an unfair practice in violation of section 5 of the Federal Trade Commission Act to fail to disclose in food advertising nutrition information which is of importance in making basic determinations about the advertised food. With respect to such acts or practices which impair consumers' "freedom to choose among available products," the Commission has "a broad mandate to proscribe."¹⁵

Several additional considerations support the conclusion that the failure to disclose nutrition information in food advertising is an unfair practice under section 5. In the Statement of Basis and Purpose for the Cigarette Labeling and Advertising Rule, the Commission recognized that modern mass media advertising on a vast scale

... is a form of power in the market place—power over the buying choice of consumers. It is lawful power. But just as the possession of lawfully-acquired market or monopoly power in the antitrust sense may nevertheless place a firm under a special duty of fair dealing toward its competitors, an advertiser's possession of great power vis-a-vis consumers may place him under a special duty of fair dealing toward them ... [citations omitted].¹⁶

As previously noted, the food industry spends more than 800 million dollars a year in advertising; no industry spends more. These facts alone make appropriate the recognition of a special duty of fair dealing even apart from the fact that the products involved relate directly to health.

Far from emphasizing even nutrition in general, however, let alone brand-specific nutrition information, food advertising "(c)onsidered as a whole ... has emphatically and persistently driven home, in the minds of its vast audience, the pleasure and desirability" of the advertised food wholly apart from considerations of nutrition.¹⁷ In the Cigarette Rule, the Commission found that the cigarette industry's

... massive, continuous, mounting, and forceful advertising, coupled with the refusal to acknowledge or take any steps to inform the consuming public of the hazards to health, has blunted public awareness and appreciation of these hazards and has tended

¹ See, *F.T.C. v. R. F. Keppel & Bros., Inc.*, 291 U.S. 304 (1934).

² *F.T.C. v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972).

³ Care Labeling Rule, supra, note 66, 36 FR 23883.

⁴ Octane Rule, supra, note 77, 36 FR 23871.

⁵ Trade Regulation Rule Relating to Incandescent Lamps (Light Bulbs) (1971), 36 FR 11784. [Hereinafter cited as "Lamp Rule."]

⁶ Cigarette Rule, supra, note 68, 29 FR 8324.

⁷ Care Labeling Rule, supra note 66, at 7, 19, 24, 36 FR 23885, 23888, 23889.

⁸ Care Labeling Rule, supra note 66, at 23, 24; 36 FR 23889.

⁹ Id.

¹⁰ Octane Rule, supra note 77, at 8-22, 41-42; 36 FR 23873-23874, 23880.

¹¹ Octane Rule, supra note 77, at 23-28, 43; 36 FR 23876-23877, 23881.

¹² Octane Rule, supra note 77, at 39-40, 36 FR 23880.

¹³ Lamp Rule, supra, note 85, 36 FR 11784. The Lamp Rule itself does state that the withholding of information required to be disclosed is not only a deceptive but also an unfair practice.

¹⁴ Cigarette Rule, supra note 68, at 93-95, 29 FR 8353-8354. Cf., *Rodale Press, Inc.*, 71 F.T.C. 1184, 1239, 1241 (1967), vacated and remanded on other grounds, *Rodale Press, Inc. v. F.T.C.*, 407 F.2d 1252 (D.C. Cir. 1968); *Firestone Tire and Rubber Co.*, 81 F.T.C. 398, 451-452 (1972); as modified, Feb. 16, 1973, aff'd, 481 F.2d 246 (6th Cir. 1973), cert. denied, 414 U.S. 1112 (1973).

¹⁵ Cigarette Rule, supra, note 68, at 104, 29 FR 8357.

¹⁶ Cigarette Rule, supra, note 68, at 105, 29 FR 8357.

¹⁷ Cigarette Rule, supra, note 68, at 104-105, 29 FR 8357.

to maintain demand for the product in the face of growing public concern.¹²

Similarly, food advertising taken as a whole has tended to blunt public awareness of the health significance of food choices and to encourage patterns of consumption which are contributing to a decline in the nutritional status of major segments of the population.

These considerations relating to unfairness are given yet greater force by the nutrient labeling rules of the Food and Drug Administration.¹³ Those rules require as a matter of law that nutrient information appear on the labeling of many types of foods. They do so, moreover, not simply under a general public interest standard, but, rather, under the misbranding provisions of the Food, Drug and Cosmetic Act. The importance of nutrition and nutrition information relating to specific brands has, therefore, already moved (unlike the issue of the health impact of smoking at the time of the Cigarette Rule) out of the realm of mere public concern to the status of a duty imposed by law. Advertising with the capacity or tendency to contradict nutrient labeling information, or to reduce the likelihood that it will be utilized, or to dilute its impact, is for that reason unfair under section 5. The relationship of food labeling and advertising will be discussed below in the Remedy section of this Statement. It will be seen that the failure to disclose nutrition information in food advertising can have just these effects.

For these reasons, the staff concludes that food advertising is unfair under section 5 of the Federal Trade Commission Act if it fails to disclose nutrition information relating to the advertised food. That failure makes it difficult for a consumer to reach basic determinations concerning food, tends to inhibit appreciation of the importance of nutrition, and causes injury both to health and to the pocketbook.

V. THE CHOICE OF REMEDY

It has been established in the preceding discussion that, because of deception and unfairness in advertising linked directly to both misleading representations and the failure to disclose relevant and material nutrition information about foods, consumers are unable at present to assess properly the nutritional value of many foods and to select the foods which they will purchase on the basis of such values. The question therefore arises as to how to provide such information to consumers so as to eliminate this deception and unfairness. As the Commission stated in the Cigarette Rule:

Whether the ill effects of deceptive non-disclosure can be cured by a disclosure requirement limited to labeling, or whether some other requirement of disclosure in advertising should be imposed, is essentially a question of remedy. As such it is a matter within the sound discretion of the Commission. The question of whether in a particular case to require disclosure in adver-

tising cannot be answered by application of any hard and fast principle. The test is simple and pragmatic: Is it likely that, unless such disclosure is made, a substantial body of consumers will be misled to their detriment?¹⁴

As a general proposition, since consumers are injured as a result of the deceptive and unfair non-disclosure of nutrition information in advertising, disclosure of some form of nutrition information in advertising would appear to be reasonably related to these violations and a means of avoiding such injury. The nature and extent of such disclosure involves resolution of numerous issues of fact. There is a general issue of policy, however, we wish to address prior to the receipt of public comment. That issue is whether the existence of FDA's nutrient labeling program eliminates the necessity for any disclosures in food advertising.

At the outset, it should be noted that not all foods will carry nutrient labels.¹⁵ As to foods which do contain nutrient labels, it presently appears to the staff to be not only reasonable but necessary that the advertiser for such foods also disclose nutrition information.

The existence of nutrient labeling is itself an affirmative reason in support of advertising disclosure. Without advertising disclosure, massive food advertising may well undermine or defeat the intended purpose of the labels. Massive food advertising avoids the subject of brand-specific nutrition information—and instead attempts to sell food products solely for such factors as taste, appearance, and association with social pleasures—has the capacity or tendency to obscure the importance of nutrition and to reduce the importance or relevance of nutrient labels to consumers. It is highly pertinent to this point that the architects of the nutrient labeling program at FDA do not view that program as a panacea for problems of malnutrition but see other steps, including information in advertising, as necessary adjuncts to the elimination of ignorance and deception. For example, Doctor Charles C. Edwards, Assistant Secretary for Health, has stated:

In my opinion, the nutritional labeling program is a remarkably important accomplishment . . .

But I don't want to overestimate the importance of what we have managed to do so far.

I will tell you flatly that this achievement will amount to nothing if we, as a nation, fail to complete the work that has been started.

What I am saying is that the products have to change, and so does the way they are presented to the American people.

Certainly, the primary function of food advertising is to get people to buy the product. But the way to do that, in my judgment, will be to present the public full and accurate information on what that product

¹² Cigarette Rule, supra, note 68 at 89-90, 29 FR 8352. (footnotes omitted)

¹³ The foods that will be covered by general nutrient labels are, with certain limited exceptions, those that contain any added vitamins, minerals, or protein, or whose labeling or advertising contains claims or information concerning nutrition.

has to offer in the way of nutritional content.¹⁶

Similarly, as noted earlier, a study on the effects of nutrient labeling on food purchasing found that, in the absence of information to the contrary from an authoritative source, consumers believe that heavily advertised name brands are good products, high in nutrient value.¹⁷ This assumption can vitiate the impact of nutrient labeling on many prospective purchasers and thus decrease its effectiveness.

Beyond simply maintaining the integrity of the FDA nutrient labeling program, nutrition disclosures in advertising can complement the label and increase its use, thereby substantially increasing the ability of consumers to obtain more nutritious food as part of their diets. It is particularly reasonable to complement nutrient labeling in view of the number of persons either malnourished or at risk of malnourishment, and in view of rapidly rising food prices that increase the utility to consumers of information about comparative nutrition values.¹⁸

Advertising is a powerful force for increasing the awareness of nutrition and for making nutrition a factor, along with others, to be regularly taken into account in food choices. By making nutrition more salient, the use of nutrition labels should be increased.

Moreover, food choices are often made before the consumer arrives at the supermarket and, therefore, before the label is seen. Advertising is an important part of this selection process. It is, indeed, the very purpose of advertising to induce a decision to purchase prior to actual shopping. By introducing information about nutrition at a stage in the selection process prior to actual shopping, advertising disclosures will provide an important complement to labeling, for example, by reducing the instances in which purchase decisions formed by advertising would have to be remade at the point of purchase through use of the label.

Therefore, the staff believes it is essential to the elimination of deception and unfairness in food advertising that nutrition information concerning advertised foods be required to be included in some form in virtually all food advertising, not merely that which makes explicit nutrition claims of the sort governed by Subpart B of the Commission's proposed rule.

¹⁴ Address by Charles C. Edwards, M.D., "Nutritional Labeling And Public Health," delivered before the Family Health Annual Awards Luncheon, New York, October 9, 1973. [Italic added.]

¹⁵ "Effects Of Nutritional Labeling On Food Purchasing," supra note 80 at 18.

¹⁶ In addition to bearing upon the prevention of deception and unfairness, considerations of public policy directly involving nutrition are in themselves relevant to fashioning a remedy. The Supreme Court long ago recognized the "importance of taking fair account, in a civilized legal system, of every socially desirable factor in the final judgment . . ." Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 197 (1941) (per Frankfurter, J.) (requiring NLRB to take account, in fashioning a back pay order, of "the healthy policy of promoting production and employment" 313 U.S. at 200).

¹⁷ Cigarette Rule, supra, note 68, at 105, 29 FR 8357.

¹⁸ See, inter alia, 21 CFR 1.2, 1.17, 1.18, Part 125. (1973).

The following is the text of a staff proposal for achieving the affirmative disclosure of nutrition information in food advertising as to which the Commission wishes to elicit comments. However, neither the Commission nor the Bureau Director or the Assistant Director for National Advertising is presently prepared to propose the following provisions as part of the rule.

AFFIRMATIVE DISCLOSURE

SECTION 1—FOODS WITH NUTRIENT LABELS

If a food contains an added nutrient (except as provided in 21 CFR 1.17(h)), or if any nutrition claim or information respecting nutrition is made on the label, in labeling, or in advertising, or if its label or labeling is subject to the requirements of 21 CFR 1.17, an advertisement for such food shall clearly and conspicuously disclose the following information:

a. In the video portion of any television advertisement 30 seconds or less in length, for a minimum of six (6) seconds, the identities of at least four (4) of the following eight (8) nutrients using the following common or usual names: Protein, Vitamin A, Vitamin C, Thiamine, Riboflavin, Niacin, Calcium and Iron, which are present in a serving in amounts of 10 percent or more of the U.S. RDA (or, if the food contains less than four (4) such nutrients, each nutrient present in said amount), as well as the percentage of the U.S. RDA of each such nutrient and the number of calories contained in a stated serving.

1. Alternatively, the video portion of any such advertisement shall clearly and conspicuously disclose, for a minimum of fifteen (15) seconds, the nutrition information which is required to appear on the principal display panel and information panel(s) of the food label (see 21 CFR 1.8d) in the standard format described in 21 CFR 1.17; *Provided, however*, That any nutrient present in a serving in an amount less than 2 percent of the U.S. RDA shall be indicated either by a zero or by a notation (without the use of any asterisk) that such nutrient is present in an amount of less than 2 percent of the U.S. RDA.

2. If the alternative disclosure set forth in the immediately preceding paragraph is not made and if the advertised food does not contain at least one nutrient in an amount of 10 percent or more of the U.S. RDA per serving, such advertisement shall clearly and conspicuously make the following specific disclosure simultaneously in the audio and video portions:

This food does not contain 10% or more of the U.S. RDA of any vitamin, mineral or protein.

3. Immediately upon the conclusion of the disclosure of nutrient data in the video portion, or the simultaneous audio/video disclosure that the advertised food does not contain 10 percent or more of the U.S. RDA of any vitamin, mineral or protein, the audio portion of such advertisement shall clearly and conspicuously make the following specific disclosure:

Read the food label for more nutrition information.

b. In the video portion of any television advertisement greater than 30 seconds in length, for a minimum of twelve (12)

seconds, the identity and percentage of the U.S. RDA per stated serving of each of the following eight (8) nutrients using the following common or usual names: Protein, Vitamin A, Vitamin C, Thiamine, Riboflavin, Niacin, Calcium, and Iron, which is present in a serving in an amount of 10 percent or more of the U.S. RDA, as well as the number of calories per stated serving.

1. Alternatively, the video portion of any such advertisement shall clearly and conspicuously disclose, for a minimum of fifteen (15) seconds, the nutrition information which is required to appear on the principal display panel and information panel(s) of the food label (see 21 CFR 1.8d) in the standard format described in 21 CFR 1.17; *Provided, however*, That any nutrient present in an amount less than 2 percent of the U.S. RDA shall be indicated either by a zero or by a notation (without the use of any asterisk) that such nutrient is present in an amount of less than 2 percent of the U.S. RDA.

2. If the alternative disclosure set forth in the immediately preceding paragraph is not made, and if the advertised food does not contain at least one nutrient in an amount of 10 percent or more of the U.S. RDA per serving, such advertisement shall clearly and conspicuously make the following specific disclosure simultaneously in the audio and video portions:

This food does not contain 10% or more of the U.S. RDA of any vitamin, mineral or protein.

3. Simultaneously with the disclosure of nutrient data in the video portion, the audio portion of such advertisement shall clearly and conspicuously disclose the identities of at least four (4) of the nutrients disclosed in the video portion, as well as the percentage of the U.S. RDA of each such nutrient and the number of calories contained in a stated serving; and immediately upon the conclusion of such disclosure, or immediately upon the conclusion of the simultaneous audio/video disclosure in subparagraph (2) hereinabove (that the advertised food does not contain 10 percent or more of the U.S. RDA of any vitamin, mineral or protein), shall clearly and conspicuously make the following specific disclosure in the audio portion:

Read the food label for more nutrition information.

c. In any print advertisement (except one described in section 1(e) hereinbelow), the identity and percentage (including zero percent) of the U.S. RDA per stated serving of each of the eight (8) nutrients listed in sections 1(a) and 1(b) above, as well as the number of calories per stated serving.

1. Alternatively, such advertisement shall clearly and conspicuously disclose the nutrition information which is required to appear on the principal display panel and information panel(s) of the food label (see 21 CFR 1.8d) in the standard format described in 21 CFR 1.17.

d. In any radio advertisement, the following specific disclosure:

Read the food label for nutrition information.

e. In any billboard or other display advertisement (except one which is located in the interior of a public transit vehicle) normally viewed and read from a distance substantially greater than the normal range of reading distances for a book, newspaper, magazine or other similar printed reading matter, the following specific disclosure:

Read the food label for nutrition information.

SECTION 2—FOODS WITHOUT NUTRIENT LABELS

a. If a food is not subject to the provisions of section 1 hereinabove, an advertisement for such food shall clearly and conspicuously disclose the following information:

1. The number of calories per stated serving; and

2. Unless it is demonstrated that relevant analytical data for the advertised food or, in the absence of such data, that relevant analytical data for the specific kind of advertised food indicate that a serving of food contains at least one nutrient in an amount of 10 percent or more of the U.S. RDA, the following specific disclosure:

This food does not contain 10% or more of the U.S. RDA of any vitamin, mineral or protein.

b. An advertisement which does not mention the distributor of a food or his brand(s) for fresh meat, fish or fowl; or a fresh vegetable; or a fresh fruit; or fresh potatoes which food, apart from the disclosure hereinafter provided, would not be subject to the provisions of section 1 hereinabove, may clearly and conspicuously disclose the common or usual name (without any designation of the percentage of the U.S. RDA per serving) of any of the eight (8) nutrients listed in sections 1(a) and 1(b) hereinabove which, according to relevant analytical data for the specific kind of advertised food, is found in such food in an amount of 10 percent or more of the U.S. RDA per serving; *Provided, however*, That such advertisement shall not be required to disclose the number of calories per stated serving in compliance with section 2(a) hereinabove.

The preceding proposal concerning affirmative disclosure is intended to be subject to the provisions of Subpart A of the Commission's proposed rule concerning definitions and form, content and method of making disclosures. In addition, staff would propose adding or substituting certain provisions in Subpart A of the Commission's proposed rule, were the preceding proposal to be incorporated in the rule:

(To § 437.1(a), add the following as parts of the proposed definition of "advertisement":)

1. Add to the proposed last sentence, after the words "It does not include point-of-purchase advertising", the phrase:

, except for a food covered by the provisions governing the advertising of 'natural' or 'organic' foods,.

2. Add a new last sentence stating:

Advertising by restaurants which contains any claim covered by Subpart B of this rule shall comply fully with the provisions

therein, but shall be exempt from the provisions relating to affirmative disclosure.

(In place of the same lettered paragraphs and/or subparagraphs of § 437.2, substitute the following provisions:)

(a) *Nutrients.* (1) Except as otherwise specifically permitted under Section 1 of the provisions governing affirmative disclosure, any disclosure of a nutrient shall be made only from among the following nutrients (listed in descending order of percentage of the U.S. RDA per serving), using the following common or usual names: Protein, Vitamin A, Vitamin C, Thiamine, Riboflavin, Niacin, Calcium and Iron.

(i) In the video portion of an advertisement governed by section 1(a) of the provisions on affirmative disclosure which discloses the nutrient(s) contained at 10 percent or more of the U.S. RDA, or in the audio portion of an advertisement under section 1(b)(3) of those provisions, the nutrient(s) disclosed shall be the nutrient(s) contained in a serving of the advertised food at the highest percentage(s) of the U.S. RDA.

(ii) An advertisement for a food may represent that such food contains the common or usual name of any additional nutrient listed under 21 CFR 1.17(c) (7) (iv) and 21 CFR 125.1(b) if there is full compliance with § 437.1(a)(2) of this rule.

(2) Except as specifically permitted by the alternative video disclosures (of label information) in sections 1(a)(1) and 1(b)(1) of the provisions governing affirmative disclosure, or by section 1(c) of those provisions (disclosure of label information), and except by use of the terms "enriched" or "fortified" as part of the common or usual name of a standardized food, a food shall not be represented in advertising (whether by any required disclosure or voluntary claim) as containing a nutrient, unless (i) the nutrient's (a) identity (expressed as the common or usual name) and (b) amount (stated as a percentage of the U.S. RDA contained in a stated serving of the advertised food) are clearly and conspicuously disclosed in accordance with all the provisions governing affirmative disclosure, and unless (ii) a serving of such food contains the identified nutrient in an amount of 10 percent or more of the U.S. RDA. If a food or serving thereof is required to contain any nutrient at a certain percentage of the U.S. RDA before either a voluntary claim may be made (see Subpart B) or a disclosure is required under the provisions governing affirmative disclosure, the actual percentage (prior to any rounding off) of the U.S. RDA at which any such nutrient is contained in the advertised food or a serving thereof shall determine whether the condition(s) for making the claim or disclosing nutrient content has (have) been satisfied.

(b) *Protein.*

(2) Representations in advertising of the presence of protein may be made only if a serving of the advertised food contains protein at a level of 10 percent or more of the U.S. RDA and the total protein in the advertised food alone has a PER of 20 percent or more of the PER of casein.

(g) *Television advertisements—method and form of disclosures.* Under § 437.2(a) and (b) and Subpart B of this rule, any disclosure in any television advertisement shall be made clearly and conspicuously in the same portion (audio or video) of the advertisement in which the voluntary claim is made, and in immediate conjunction with and at least as clear and conspicuous as the voluntary claim which creates the requirement for such disclosure. Under the provisions governing affirmative disclosure, except as specifically provided otherwise (see sec-

tion 1 of those provisions), any disclosure in any television advertisement shall be made simultaneously in the audio and video portions of the advertisement. The video portion of any disclosure in any television advertisement shall be prominently displayed in the form of a super or title, or prominently displayed on the screen by itself (except that in television advertisements covered by the provisions governing affirmative disclosure which are greater than 30 seconds in length the relevant nutrition information shall always be prominently displayed on the screen by itself, simultaneously with the required audio disclosure) so as to enable it to be completely and easily seen and read (see section 1 for certain specific requirements) on all television sets, regardless of picture tube size, that are commonly available for purchase by the consuming public.

(h) *Print advertisements—method and form of disclosures.* (1) Under § 437.2 (a) and (b) and Subpart B of this rule, any disclosure in any print or display advertisement shall be made clearly and conspicuously, either in immediate conjunction with and at least as clear and conspicuous as the voluntary claim which creates the requirement for such disclosure, or prominently displayed by itself in any sans serif type style consistent with the requirements set forth in § 437.1(g)(1) of this rule and hereinbelow, but in no event in condensed type. Under the provisions governing affirmative disclosure, any disclosure in any print or display advertisement shall always be prominently displayed by itself in any sans serif type style consistent with the requirements set forth in § 437.1(g)(1) of this rule and hereinbelow, but in no event in condensed type. Under any provision of this rule, where a disclosure is prominently displayed by itself (i.e., not in immediate conjunction with the voluntary claim) the type shall be set on a slug at least one point larger than the point size of the type (not solid), using only normal word and letter spacing. In the case of advertisements within the provisions of section 1(e) of the provisions governing affirmative disclosure, the complete disclosure shall be displayed in capital letters. A determination of whether a particular disclosure is "clear and conspicuous" within the definition set forth under § 437.1(g)(1) of this rule shall be made by examining the context of the total advertisement, but in no event shall a disclosure be deemed clear or conspicuous unless it appears in type of at least the following sizes, size being measured by the height of the smallest letter employed in making the disclosure.

(i) For any disclosure required by section 2.1²⁰ at least $\frac{1}{2}$ inch type; for all other disclosures, at least $\frac{1}{4}$ inch type, in advertisements of a trim size not larger than 65 square inches.

(ii) For any disclosure required by section 2.1²⁰ at least $\frac{1}{4}$ inch type, for all other disclosures, at least $\frac{1}{8}$ inch type, in advertisements of a trim size larger than 65 square inches, but not larger than 110 square inches.

(iii) For any disclosure required by section 2.1²⁰ at least $\frac{1}{2}$ inch type; for all other disclosures, at least $\frac{1}{4}$ inch type, in advertisements of a trim size larger than 110 square inches, but not larger than 180 square inches.

(iv) In advertisements of a trim size larger than 180 square inches subject to section 1(c) or 1(c)(1): For any disclosure required by section 2.1²⁰ type of at least a size bearing the same proportion to the size of the advertisement as the proportion of $\frac{1}{2}$ to 180 square

inches; for all other disclosures, at least type of a size bearing the same proportion to the size of the advertisement as the proportion of $\frac{1}{4}$ to 180 square inches.

(v) For all disclosures, at least $\frac{1}{4}$ inch type, in advertisements subject to section 1(e)²⁰ of a trim size larger than 180 square inches, but not larger than 270 square inches.

(vi) For all disclosures, at least $\frac{1}{4}$ inch type, in advertisements subject to section 1(e)²⁰ of a trim size larger than 270 square inches, but not larger than 1500 square inches.

(vii) For all disclosures, a size of at least one inch per 3000 square inches times the area of the advertisement expressed in square inches [i.e., size = (1 inch/3000 square inches) × (area of the advertisement in square inches)], but in no event of a size less than $\frac{1}{2}$ inch, in advertisements subject to section 1(e)²⁰ of a trim size larger than 1500 square inches.

(To § 437.2(h) add the following two provisions between proposed subparagraphs (2) and (3), renumbering the succeeding proposed subparagraphs as (5), (6) and (7)).

(1) If an advertisement occupies part of two or more pages, any disclosure required by the provisions governing affirmative disclosure shall appear on that page which contains the greatest part of the advertisement. Where the largest portions of an advertisement appearing on more than one page are equal in size, any disclosure required by those provisions shall appear on the first page occupied by the first of the largest portions of the advertisements.

(2) Any disclosure required by any provision governing affirmative disclosure shall be sufficiently separated from the text consistent with the manner described hereinbelow so that it can be easily read and understood by the casual observer or reader, and shall be printed in black against a solid white background and shall not be contained as an integral part of any specific pictorial design or illustration. Any such disclosure shall appear within a prominently ruled square or rectangle headed in capital letters "NUTRITION INFORMATION PER SERVING".

Further, the disclosure required by section 1(c) of the provisions governing affirmative disclosure shall be made in the form of a table containing the following items in the following order, with each item placed beneath the preceding item: (i) The heading, as required above, in capital letters stating "NUTRITION INFORMATION PER SERVING"; (ii) serving size expressed as "serving size [size]"; (iii) calories per serving expressed as "calories per serving [number]"; (iv) a heading stating in capital letters "PERCENTAGE OF U.S. RECOMMENDED DAILY ALLOWANCES (U.S. RDA)"; and (v) the identity and percentage (including zero percent) of the U.S. RDA per stated serving of each of the eight (8) nutrients listed in section 1(a) of the provisions governing affirmative disclosure [nutrients], in descending order of percentage of the U.S. RDA per serving,²¹ with the nutrients being set forth in parallel columns, one column listing the nutrients and the other listing the corresponding percentages of the U.S. RDA at which each is present in a serving of the advertised food.

²⁰ These sections refer to the provisions governing affirmative disclosure.

²¹ Id.

²² Id.

²³ Id.

²⁰ Id.

²¹ Id.

²² Id.

²³ See substitute § 437.2(a)(1) set forth above in connection with the preceding proposal on affirmative disclosure.

NOTICES

Below are (vi) an example of the format specified for disclosures required by section 1(c) of the provisions governing affirmative disclosure; and (vii) an example of the format specified for disclosures required, as appropriate, by sections 2(a) (1) and (3) of those provisions. The examples are intended only to illustrate the required format, and in no way should be construed to represent actual type size or style.

(a)

NUTRITION INFORMATION PER SERVING

Serving size (ounces)..... 6
Calories per serving..... 210

PERCENTAGE OF U.S. RECOMMENDED DAILY ALLOWANCES (U.S. RDA)

Vitamin A.....	20
Vitamin C.....	15
Niacin.....	10
Riboflavin.....	10
Protein.....	6
Iron.....	4
Calcium.....	2
Thiamine.....	0

(b)

NUTRITION INFORMATION PER SERVING

210 calories per 6 oz. serving.

This food does not contain 10% or more of the U.S. RDA of any vitamin, mineral or protein.

The following are specific provisions which staff would include in those sections of Subpart B of the proposed rule where the Commission is not presently prepared to propose particular provisions. The Commission wishes to elicit comment on these provisions.

§ 437.6—Natural and organic food claims.

(a) A food shall not be represented in advertising to be "natural" or a "natural food" or "naturally grown", or otherwise be depicted, designated or described by any term or demonstration of similar import. However, an advertisement may represent that a food does not contain any artificial or synthetic preservatives, flavors or colors, or any other

artificial or synthetic ingredients, if such is the fact.

(b) A food shall not be represented in advertising to be "organic" or an "organic food" or "organically grown", or otherwise be depicted, designated or described by any term or demonstration of similar import. However, an advertisement may represent that a food has not been grown with or subjected to pesticides or artificial fertilizers or artificial conditioners, if such is the fact.

(c) An advertisement for a food which makes any representation permitted under § 437.6 (a) and (b) hereinabove shall not further represent that such food is nutritionally superior to any other food(s) on the basis of such permitted representation.

§ 437.9—Fat, fatty acid and cholesterol content claims.

(a) An advertisement shall not contain any representation regarding the fat, fatty acid or cholesterol content of an advertised food, unless such food meets the criteria set forth in 21 CFR 1.18 and carries a nutrient label in compliance with that regulation. If such food meets the criteria set forth in 21 CFR 1.18 and carries a nutrient label in compliance with that Regulation, an advertisement may contain only those representations which are permitted under 21 CFR 1.18.

(b) An advertisement shall not contain any representation that consumption of an advertised food or a serving thereof will prevent, mitigate or cure, or in any way contribute to the prevention, mitigation or cure of, heart or artery disease or any attendant condition.

(c) An advertisement shall not represent that consumption of an advertised food or a serving thereof will not cause or help cause, or will not increase or help increase the likelihood or risk of, heart or artery disease or any attendant condition.

§ 437.10—Health and related claims.¹²³

(a) An advertisement shall not contain a representation that:

¹²³ See 21 CFR 1.17(1).

(1) A food, because of the presence or absence of certain vitamins and/or minerals, is adequate or effective in the prevention, cure, mitigation, or treatment of any disease or symptom.

(2) A balanced diet of ordinary foods cannot supply adequate amounts of nutrients.

(3) The lack of optimum nutritive quality of a food, by reason of the soil on which that food is grown, is or may be responsible for an inadequacy or deficiency in the quality of the daily diet.

(4) The storage, transportation, processing or cooking of a food is or may be responsible for an inadequacy or deficiency in the quality of the daily diet.

(5) A food possesses any dietary property when such property is of no significant value or need in human nutrition. Ingredients or products such as rutin, or other bioflavonoids, para-aminobenzoic acid, inositol and similar substances which have not been shown to be essential in human nutrition shall not be represented in any way which states or implies nutritional benefit. Ingredients or products of this type may be advertised as individual products or mixtures thereof; *Provided, however*, That the possibility of nutritional, dietary or therapeutic value is not stated or implied. Examples of false or misleading statements or implications are:

(i) Statements to the effect that their need or usefulness in human nutrition has not been established.

(ii) Statements which otherwise disclaim nutritional, dietary or therapeutic value.

(6) A natural vitamin in a food is superior to an added or synthetic vitamin, or that there is a difference between vitamins, naturally present and those that have been added.

(b) A food shall not be represented in advertising as a "health food" or as containing "health foods," or otherwise be depicted, described or designated by any term or demonstration of similar import.

Issued: November 7, 1974.

[SEAL]

CHARLES A. TOBIN,
Secretary.

[FR Doc.74-26141 Filed 11-8-74; 8:45 am]

BEST COPY AVAILABLE

Item 3

PROPOSED RULES

FEDERAL HOME LOAN BANK BOARD
[12 CFR Part 545]
[No. 76-142]

FEDERAL SAVINGS AND LOAN SYSTEM
Payments to Third Parties

FEBRUARY 25, 1976.

Summary. The following summary of the amendment proposed by this resolution is provided for the reader's convenience and is subject to the full explanation in the following preamble and to the specific provisions of the regulation.

Existing regulation. Restricts third party payment powers of Federal association accountholders by requiring them to present a payment order or authorization to the association for payment to a third party.

II. Proposed amendments. Would permit Federal association accountholders to authorize payment from their accounts to third parties based on orders electronically transmitted through automated clearing houses.

III. Effect of proposed amendments. Would expand third party payment powers of Federal association accountholders.

The Federal Home Loan Bank Board considers it desirable to propose to amend § 545.4-1 of the rules and regulations of the Federal Savings and Loan System (12 CFR 545.4-1) to enable Federal associations to offer their accountholders a broadened range of third party payment services as described below.

Section 545.4-1(a)(1) presently allows a holder of a savings account in a Federal association to order or authorize payment therefrom to a third party, provided the payment order or authorization is not negotiable or transferable and is received by the association from the accountholder. Under the present regulation, an accountholder may direct an association to pay third parties by telephone authorization, once-a-month written authorization mailed to the association, or by standing authorization for the association to pay recurring bills. However, § 545.4-1(a)(2) precludes an accountholder from sending or delivering a payment order or authorization to a third party for presentation for payment by the association.

The Board proposes to amend § 545.4-1(a)(2) to allow Federal association accountholders to authorize and associations to honor payment orders or authorizations processed through an automated clearing house. The proposed amendment would thus expand the choice of third party payment services which Federal associations could offer their accountholders and provide more efficient and economical transfer of funds.

Accordingly, the Board hereby proposes to revise § 545.4-1(a)(2) to read as set forth below.

Interested persons are invited to submit written data, views and arguments to the Office of the Secretary, Federal Home Loan Bank Board, 320 First Street NW., Washington, D.C. 20552, by April 2, 1976, as to whether this proposal should

be adopted, rejected, or modified. Written material submitted will be available for public inspection at the above address.

§ 545.4-1 Payments to third parties by withdrawals or transfer of savings accounts; checks and money orders.

(a) *Withdrawals and transfers*—(1) *General.*

(2) *Restrictions.* An accountholder shall not have a right to transmit or deliver any such order or authorization to a third party to whom a withdrawal is to be paid or transferred, and a Federal association shall not accept any such order or authorization which is received by it from or through such a third party except for orders or authorizations processed through an automated clearing house.

(Sec. 5, 48 Stat. 132, as amended; (12 U.S.C. 1464). Reorg. Plan No. 3 of 1947, 12 FR 4981, 3 CFR, 1943-48 Comp., p. 1071)

By the Federal Home Loan Bank Board.

(SEAL)

J. J. FINN,
 Secretary.

[FR Doc. 76-5912 Filed 3-1-76; 8:45 am]

FEDERAL TRADE COMMISSION

[16 CFR Part 437]

FOOD ADVERTISING

Final Notice Regarding Proposed Trade Regulation Rule

On November 11, 1974, the Federal Trade Commission published in the *FEDERAL REGISTER* (39 FR 39842) an initial notice that the Commission was initiating a proceeding for the promulgation of a Trade Regulation Rule concerning food advertising pursuant to the Federal Trade Commission Act, as amended, 15 U.S.C. 41, et seq., the provisions of Part 1, Subpart B of the Commission's procedures and rules of practice, 16 CFR 1.11, et seq.; and 553 of Subchapter II, Chapter 5, U.S. Code (Administrative Procedure). Included in the initial notice were the proposed Rule; an Explanation and Basis of Proceeding; an Analysis and Statement of Issues by Section; an Announcement of Opportunity to Submit Data, Views or Arguments; a Staff Statement of Fact, Law and Policy in Support of the Proposed Rule and in Support of Affirmative Disclosures in Food Advertising; and a staff proposal for achieving the affirmative disclosure of nutrition information in food advertising.

On May 28, 1975, the proposed rule was republished in the *FEDERAL REGISTER* (40 FR 23086) in order to conform to the rulemaking provisions contained in the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act (Pub. L. No. 93-637, January 4, 1975), again giving notice of the initiation of a proceeding for the promulgation of a Trade Regulation Rule on food advertising pursuant to the Federal Trade Commission Act, as amended, 15 U.S.C. 41, et seq., and the provisions of Part 1,

Subpart B of the Commission's Procedures and rules of practice, 16 CFR 1.7, et seq.

This notice included in *haec verba* the provisions of the proposed rule, and incorporated by reference, among other things, the Explanation and Basis of Proceeding, the Analysis and Statement of Issues by Section, and the Staff Statement of Fact, Law and Policy. In addition to the foregoing, the notice contained a Statement of Reasons for the Proposed Rule, an Invitation to Propose Issues of Specific Fact for Consideration in Public Hearings, and an Invitation to Comment on the Proposed Rule.

The Presiding Officer has determined that further proceedings in this matter will be held in three phases. The first phase, final notice of which is given in this document, will consist of public hearings concerning the voluntary claims sections dealing with natural and organic food claims (§ 437.6); certain issues involving energy and calorie claims (§ 437.8(a)-(d)); fat, fatty acid and cholesterol content claims (§ 437.9); health and related claims (§ 437.10); certain definitions (§ 437.1 (a), (b), (e), (f), (g) and (h)) and certain issues involving form, content and method of making disclosures (§ 437.2 (d), (e), (f), (g) and (h)). The second phase will involve primarily emphatic nutrition claims (§ 437.3); nutrient comparison claims (§ 437.4); nourishment claims (§ 437.5); and claims for foods intended to be combined with other foods (§ 437.7). The third phase will involve the issue of mandatory affirmative disclosure of nutrition information in food advertising. (The precise sections as to which final notice of rulemaking is hereby given, as well as those for which further notice will be given at a later date, are set forth below.)

Interested persons are also informed that the staff of the Bureau of Consumer Protection is considering recommending to the Commission that the sections dealing with emphatic nutrition claims (§ 437.3), nutrient comparison claims (§ 437.4), nourishment claims (§ 437.5), claims for foods intended to be combined with other foods (§ 437.7) and those subprovisions of §§ 437.1 and 437.2 as to which hearings will not be held in the first phase, be revised and republished prior to hearings. The staff's continuing consideration of these sections, including examination of comments already received and consultations with experts suggests that further refinement of these provisions prior to hearings may eliminate unnecessary issues and otherwise enhance the rulemaking process.

As the staff wishes to consider the possibility of revision and republication in light of the broadest possible data base, persons wishing to have their written comments considered in connection with staff's determination whether to recommend to the Commission revision and republication of those sections described in the foregoing paragraph should file comments on those sections no later

than April 30, 1976.¹ Such comments should address the question whether revisions prior to hearings should be undertaken, and if revision is favored, should present and support substantive revisions. Such comments could bear substantially upon the staff's decision whether to recommend revision and republication or to proceed directly to hearings on the current proposals. That decision will turn not only upon the nature and adequacy of support for any particular revisions, but also upon the extent to which substantial areas of consensus are indicated by the comments received, thereby indicating that further refinement of the proposals could in fact narrow the issues.

In light of the foregoing and pursuant to the authority described above and § 1.12 of the Commission's procedures and rules of practice, the undersigned duly appointed Presiding Officer for this proceeding hereby incorporates by reference the contents of the initial notice and republished initial notice, including the provisions of the proposed rule described therein, and gives final notice of rulemaking as to the following sections of the proposed rule:

SUBPART A—GENERAL

Section 437.1 (a), (b), (e), (f), (g) and (h)—Definitions.
Section 437.2 (d), (e), (f), (g) and (h)—Form, content and method of making disclosures.

SUBPART B—VOLUNTARY CLAIMS

Section 437.6—Natural and organic food claims (reserved).
Section 437.8 (a), (b), (c) and (d)—Energy and calorie claims.
Section 437.9—Fat, fatty acid and cholesterol content claims (reserved).
Section 437.10—Health and related claims (reserved).²

Although the specific provisions proposed by the staff in §§ 437.6, 437.9, and 437.10 were not proposed by the Commission, those provisions in the form proposed by staff, as well as alternatives that interested parties may wish to present, will be the subjective of hearings on those sections. The Presiding Officer reserves judgment on the appropriateness of recommending to the Commission that it adopt a final rule directly from these hearings and may instead, recom-

mend publication of a proposed rule for further comment.

In accordance with the determination to hold hearings in three phases, final notice of rulemaking, designation of issues, and scheduling of hearings is deferred as to the following sections of the proposed rule.

SUBPART A—GENERAL

Section 437.1 (c) and (d)—Definitions.
Section 437.2 (a), (b) and (c)—Form, content and method of making disclosures.

SUBPART B—VOLUNTARY CLAIMS

Section 437.3—Emphatic nutrition claims.
Section 437.4—Nutrition comparison claims.
Section 437.5—Nourishment claims.
Section 437.7—Claims for foods intended to be combined with other foods.
Section 437.8—Energy and calorie claims (e) and (f).

Also in accordance with the determination to hold hearings in three phases, final notice of proposed rulemaking concerning affirmative disclosure of nutrition information in food advertising, including but not limited to the proposal for implementing affirmative disclosure set forth at 39 F.R. 39860, et seq., is also deferred. The staff also invites the submission of alternative solutions to the problems posed by food advertising which is silent on nutrition and which problems are set forth in the Staff Statement of Fact, Law, and Policy.

WRITTEN COMMENTS

All interested persons are hereby notified that they may submit written data, views or arguments on any issue of fact, law, or policy bearing upon any of the sections of the proposed rule. Comments on those sections of the proposed rule for which a final notice of proposed rulemaking is being hereby published should be submitted to William D. Dixon, Presiding Officer, Federal Trade Commission, Washington, D.C. 20580, no later than April 30, 1976. To assure prompt consideration, comments should be identified as "Comments on Proposed Trade Regulation Rule on Food Advertising" indicating in the heading the sections being commented upon, and submitted, when feasible and not burdensome, in five copies.

PUBLIC HEARING DATES AND PLACES

Notice is also given that public hearings on those provisions of the proposed rule for which final notice of rulemaking is being hereby published will be held at the locations set forth below commencing on the date and time specified for each location:³

1. Public hearings will be held commencing on June 7, 1976 at 9:00 a.m. in Washington, D.C., Room 332, Federal Trade Commission, 6th & Pennsylvania Ave. NW., Washington, D.C. Persons de-

siring to present their views orally in Washington, D.C. should so inform the Commission representative listed below no later than May 18, 1976:

Ms. Leah A. Dimore [202-724-1489], Division of National Advertising, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580.

2. Public hearings will be held commencing on July 12, 1976 at 9:00 a.m. in San Francisco, California, Room 12138, Federal Building, 450 Golden Gate Avenue, San Francisco, California. Persons desiring to present their views orally in San Francisco, California, should so inform the Commission representative listed below no later than June 22, 1976:

Karper G. Proport [415-556-1270], Federal Trade Commission, 450 Golden Gate Avenue, San Francisco, California 94102.

3. Public hearings will be held commencing on September 13, 1976 at 9:00 a.m. in Chicago, Illinois, Room 347-A, John C. Kluczynski Federal Building, 230 South Dearborn Street, Chicago, Illinois. Persons desiring to present their views orally in Chicago, Illinois, should so inform the Commission representative listed below no later than August 24, 1976:

Ms. June Alvord (312-353-4423), Federal Trade Commission, Suite 1437, 55 East Monroe Street, Chicago, Illinois 60603.

4. Public hearings will be held commencing on October 12, 1976 at 9:00 a.m. in Dallas, Texas, Room 452-B, 500 South Ervay Street, Dallas, Texas. Persons desiring to present their views orally in Dallas, Texas should so inform the Commission representative listed below no later than September 21, 1976:

Ms. Rosanna C. Nardizzi (214-740-3176), Federal Trade Commission, Room 452-B, 500 South Ervay Street, Dallas, Texas 75201.

INSTRUCTIONS CONCERNING WITNESSES

All prospective witnesses are advised that reasonable limitations upon the length of time allotted to any person may be imposed and that these time periods may vary from witness to witness depending upon all the circumstances, including the complexity of the expected testimony, the number of parties sponsoring each witness and the cumulative nature of expected testimony. Witnesses will be expected to stay within the time allotted for their remarks and the Presiding Officer may allocate additional time for questioning. To the extent that expression of individual views is not unduly inhibited, individual members of interested groups are encouraged to make their views known through group representatives. As a general rule, witnesses are expected to confine their prepared remarks to thirty minutes or less unless an exception has been made upon application in advance of the appearance and to develop testimony at greater length through their written submissions. Witnesses are entitled to testify at one hearing site only.

Persons wishing to deliver prepared statements are required to file such state-

¹ Persons not wishing to file comments on these sections by April 30, 1976, may still file comments on those sections as to which final notice is deferred, pursuant to 16 CFR 1.13 (a), until forty-five days prior to the commencement of hearings on those sections. The earlier date of April 30, 1976, is for those persons who wish to have their comments considered by the staff as part of its determination whether to recommend revision and republication of those sections prior to hearings.

² Sections 437.6, 437.9, and 437.10 are provisions which staff proposed that the Commission include in Subpart B of the proposed rule. The Commission declined to adopt the specific provisions proposed by the staff for inclusion in Subpart B of the proposed rule but, nevertheless, published them for comment in the initial notice (39 FR at 36642).

³ Notice of Public hearing dates and places on those sections of the proposed rule as to which final notice of rulemaking is deferred, and on the question of affirmative disclosure of nutrition information in food advertising, will be published at a later date.

PROPOSED RULES

ments in written form with the appropriate Commission representative designated above on or before May 18, 1976, for those witnesses appearing in Washington, D.C.; on or before June 22, 1976, for those witnesses appearing in San Francisco, California; on or before August 24, 1976, for those witnesses appearing in Chicago, Illinois; and on or before September 21, 1976, for those witnesses appearing in Dallas, Texas. Where possible, each witness should furnish five copies of any statement in excess of two pages. In addition, each witness is requested to submit one copy of his or her statement to the Presiding Officer, William D. Dixon, Federal Trade Commission, Washington, D.C. 20580 simultaneously with the filing of such statement with the Commission representative designated above.

Persons intending to deliver statements not fully prepared in advance are required to file with the designated Commission representative a detailed and comprehensive written outline, by the same dates set forth above, explaining the nature of anticipated testimony including, but not limited to, a statement of each fact, observation, opinion or conclusion which the witness anticipates presenting.

Advance submission of statements and exhibits is required to apprise other interested parties of anticipated testimony so they may determine whether or not to request cross-examination or rebuttal submissions. The advance submissions will be made available for viewing by the Commission representative designated above at the location where the witness intends to appear.

The Presiding Officer retains the discretion to require that any oral presentation be submitted in writing in advance of presentation and to deny the right to present oral testimony to any person who fails to file a prepared statement in advance or otherwise comply with the requirement of advance notification established herein.

Prospective witnesses who plan to introduce documents or other written material as exhibits to their statements must furnish such documents or written material, properly identified with the witness's name and numbered in sequence (e.g., Jackson Exhibit 1), with such statements at the time they are submitted in advance of the actual appearance. Extension of time for submitting written statements and accompanying exhibits will be granted only for good cause shown.

All persons wishing to appear are encouraged to direct their statements towards any question of fact, law or policy related to those sections which are noticed for public hearings, and, in this regard, the usual rules of evidence applicable to litigated proceedings will not apply. However, all prospective witnesses are advised that to the extent their statements may bear upon any of the designated issues of fact set forth below, or to be later designated, they may be subject to limited cross-examination as to those issues by the staff of the Commission and

by representatives of other interested parties, as designated by the Presiding Officer, or to cross-examination by the Presiding Officer on behalf of such representative, or to the submission of rebuttal materials. All witnesses will be subject to direct examination by the Presiding Officer and, subject to his control, to direct examination by such interested parties as he may within his discretion permit. Oral presentations will not be under oath unless the Presiding Officer expressly so provides.

DESIGNATED ISSUES OF FACT

Set forth below are the issues which the Presiding Officer has determined to designate under § 1.13(d)(1) of the Commission's procedures and rules of practice as issues to be considered in accordance with § 1.13(d)(5) and (6) of the procedures and rules of practice. Pursuant to statute and the Commission's rules of practice, testimony with respect to these issues may entitle designated representatives of interested parties to conduct or have conducted such cross-examination as the Presiding Officer may determine to be appropriate and to be required for a full and true disclosure with respect to any issue so designated. In the alternative, the Presiding Officer may determine that full and true disclosure as to any issue may be achieved through rebuttal submissions or the presentation of additional oral or written statements.

The Presiding Officer may at any time on his own motion, or pursuant to a written petition by interested persons, add to or modify any issues listed.

Interested persons who wish to avail themselves of the procedures described above with respect to designated issues must, by March 22, 1976, notify the Presiding Officer in writing of their particular interest with respect to each issue designated, including a general statement of their position with respect to such issue. In the event new issues are added, interested persons must promptly notify the Presiding Officer of their particular interest with respect to each such issue in the same manner. Requests to conduct direct or cross-examination, or to present rebuttal submissions, must be accompanied by a specific justification therefor.

Before the hearings commence, the Presiding Officer will identify groups of persons with the same or similar interests in the proceeding. Such groups will be required to select a single representative for the purpose of conducting direct or cross-examination and, if unable to select, the Presiding Officer may select a representative of each such group. Any member of a group who is unable to agree upon group representation after a good faith effort to do so and who seeks to present or explore relevant issues which will not be adequately dealt with by the group representative may be allowed to conduct or have conducted any examination, including cross-examination or to present rebuttal submissions, to which he is entitled on issues desig-

nated for consideration in accordance with this Final Notice.

ISSUES RELATING TO SECTION 437.1 (a), (b), (e), (f), (g) AND (h)

(1) Should the following be included in the definition of "advertisement" or "advertising"?

(a) Promotional materials for generic foods;

(b) Promotional materials of the food service industry;

(c) Promotional materials appearing in professional or scientific journals.

(2) What types of materials are sufficiently promotional that they should be included in the definition of "advertisement"?

(3) Are the exclusions to the definition of "food" contained in paragraphs (1), (2), and (3) of § 437.2(b) appropriate? Should there be further exclusions?

(4) Should dietary supplements of vitamins and/or minerals be included in the definition of "food"?

(5) Is compliance with the requirements set forth in § 437.1(g)(1) (2) and (3) for "clear and conspicuous disclosure" adequate and appropriate for all media?

ISSUES RELATING TO SECTION 437.2 (d), (e), (f), (g) AND (h)

(6) What are reasonable serving sizes and how should they be disclosed so that the consumer can determine the relevance to him or her of the particular serving size presented in an advertisement?

(7) Is compliance with the methods and forms of disclosure set forth in § 437.2(g) for television advertisements and § 437.2(h) for print advertisements adequate and appropriate to ensure clear and conspicuous disclosure?

ISSUES RELATING TO SECTION 437.6—NATURAL AND ORGANIC FOOD CLAIMS

(8) Is there misunderstanding or confusion among a significant number of consumers as to the meaning of the terms "natural", "natural food", "naturally grown", "organic", "organic food", "organically grown", and terms of similar import, when used in food advertising?

(9) Do the terms "natural", "natural food", "naturally grown", "organic", "organic food", "organically grown", and terms of similar import, when used in food advertising have the tendency and capacity to represent that the advertised food is nutritionally superior, or superior in any other respect, to its counterpart, or other similar foods, not so advertised?

(10) Are foods advertised through the use of the terms "natural", "natural food", "naturally grown", "organic", "organic food", "organically grown", and terms of similar import, nutritionally superior, or superior in any other respect, to their counterparts, or other similar foods, not so advertised?

(11) Should the terms "natural", "natural food", "naturally grown", "organic", "organic food", "organically

grown", and terms of similar import, be prohibited in food advertising if it is found that:

(a) They cause confusion among, or are misunderstood by, a significant number of consumers; and/or

(b) They falsely imply that the advertised food is nutritionally superior, or superior in any other respect, to their counterparts, or other similar foods, not so advertised?

(12) If the terms "natural", "natural food", "naturally grown", "organic", "organic food", "organically grown", and terms of similar import are found to have the tendency or capacity to mislead a significant number of consumers, are there feasible measures other than banning use of such terms that will eliminate the unfairness or deception arising out of their unrestricted use?

(a) Are there uniform standards or definitions for such terms which are generally accepted among nutritionists and other scientists?

(b) Will a requirement that all foods advertised by the use of such terms comply with such uniform definitions or standards eliminate the unfairness of deception arising out of their unrestricted use?

(c) Should use of such terms be permitted in food advertising when accompanied by an explanation of precisely what is meant by them?

(d) Are there any statements or claims in addition to those expressly permitted by the staff proposal for § 437.6

(a) and (b) which, when made in conjunction with such terms, will eliminate the unfairness or deception arising out of their unrestricted use?

(13) Do the claims expressly permitted by the staff proposal for § 437.6 (a) and (b)—for example, that a food does not contain any artificial or synthetic preservatives—even if literally true, carry additional implications which have the tendency and capacity to mislead a significant number of consumers and, if so, should they be permitted?

ISSUES RELATED TO SECTION 437.8— ENERGY AND CALORIE CLAIMS

(14) To what extent do consumers understand the correct meaning of the terms "food energy" or "energy" when used in food advertising?

(15) Is the number of calories in a food which is the subject of an "energy" or "food energy" claim a material fact, non-disclosure of which would render the claim unfair or deceptive?

(16) Can consumption of a food, or nutrient, by itself, produce or provide health, general vigor, sustained energy or alertness and, if so, under what circumstances?

(17) Can the energy from calories, by itself, produce or provide strength, endurance, intellectual performance, or prevent or relieve fatigue and, if so, under what circumstances?

(18) Is the number of calories in a food which is advertised as contributing to, or enhancing, vigor, energy, alertness, strength or endurance, a material fact

non-disclosure of which would render the claim unfair or deceptive?

(19) Is the fact that a food's capacity to enhance or contribute to a person's vigor, energy, alertness, strength or endurance is enhanced by or depends, in part, upon the calories in the food a material fact, non-disclosure of which would render the claim unfair or deceptive?

(20) Are there sources of "energy" which are not measured by calories? If so, what are they and what claims should be permitted concerning them?

ISSUES RELATED TO § 437.9—FAT, FATTY ACID AND CHOLESTEROL CONTENT CLAIMS

(It is the understanding of the Presiding Officer that it is not the intent of the Commission to undertake to resolve in this proceeding the scientific issue of the relationship between diet and heart disease. Therefore, the issue that follows does not extend to that question.)

(21) Are there statements concerning the relationship between consumption of a food and the risk or occurrence of heart or artery disease, or any attendant condition, or serum cholesterol, which (a) are literally true, or supported by competent and reliable scientific evidence, and (b) do not have the tendency and capacity to deceive a significant number of consumers, and (c) are not otherwise unfair?

ISSUES RELATING TO SECTION 437.10— HEALTH AND RELATED CLAIMS

The Food and Drug Administration has promulgated regulations which are virtually identical to staff's proposed § 437.10(a) (1)-(6). Those regulations are 21 CFR 1.17(l) (1)-(6) and 21 CFR 125.2(b) (1)-(6).

Those statements which are prohibited in labeling by 21 CFR 1.17(l) (2), (3), (4), and (6) and by 21 CFR 125.2(b) (2), (3), (4), and (6) and which would be prohibited in advertising by the staff's proposed § 437.10(a) (2), (3), (4), and (6) have been found by the Commissioner of the Food and Drug Administration to be scientifically false.

Since the validity of those findings are not part of this proceeding, no issues as to those sections have been designated.

However, the statements which are prohibited in labeling by § 1.17(l) (1) and (5) and 21 CFR 125.2(b) (1) and (5) and which would be prohibited in advertising by the staff's proposed § 437.10(a) (1) and (5), may, in some circumstances, be literally true, but nevertheless false or misleading by implication. The Presiding Officer believes it appropriate to designate an issue which raises the propriety of prohibiting in ad- 125.2(b) (1) and (5) should not also be

*The regulations were promulgated after the Hearings on Special Dietary Foods (May 21, 1968 through May 4, 1970). The record on such hearings is on file with the Hearing Clerk, Department of Health, Education and Welfare, Room 6-88, 5600 Fishers Lane, Rockville, Maryland 20852.

*See Findings 3-5, 26-46 at 38 FR 20706, 20713-20715 (August 2, 1973).

vertising those statements the prohibition of which in labeling appears not to have been grounded wholly upon scientific falsity.

Accordingly, the following issue is designated under § 1.13(d) (1) with respect to staff's proposed § 437.10(a) (1) and (5):

(22) Are there reasons why the statements prohibited in labeling by 21 CFR 1.17(l) (1) and (5) and by 21 CFR prohibited in advertising? What are such reasons?

The following issues are posed with respect to staff's proposed § 437.10(b) which has no direct counterpart in regulations of the Food and Drug Administration.

(23) Is there misunderstanding or confusion among a significant number of consumers as to the meaning of the terms "health food", and terms of similar import, when used in food advertising?

(24) Does the term "health food", and terms of similar import, when used in food advertising have the tendency and capacity to represent that the advertised food is nutritionally superior, more promotive of good health, or superior to any other similar foods, not so advertised?

(25) Are foods advertised through the use of the term "health food", and terms of similar import, nutritionally superior, more promotive of good health, or superior in any other respect, to their counterparts, or other similar foods, not so advertised?

(26) Should the term "health food", and terms of similar import, be prohibited in food advertising if it is found that:

(a) They cause confusion among, or are misunderstood by, a significant number of consumers; and/or

(b) they falsely imply that the advertised food is nutritionally superior, more promotive of good health, or superior in any other respect, to its counterpart, or other similar foods, not so advertised?

(27) If the term "health food", and terms of similar import, are found to have the tendency or capacity to mislead a significant number of consumers, are there feasible measures other than banning use of such terms that will eliminate the unfairness or deception arising out of their unrestricted use?

(a) Are there uniform standards or definitions for such terms which are generally accepted among nutritionists and other scientists?

(b) Will a requirement that all foods advertised by the use of such terms comply with such uniform definitions or standards eliminate the unfairness of deception arising out of their unrestricted use?

(c) Should the use of such terms be permitted in food advertising when accompanied by an explanation of precisely what is meant by them?

SUMMARY OF CLOSING DATES

1. Notification of interest: March 22, 1976.
2. All written comments: April 30, 1976.
3. Witnesses statements or summaries and exhibits:

PROPOSED RULES

- (a) Washington, D.C. hearing: May 18, 1976.
- (b) San Francisco, California hearing: June 22, 1976.
- (c) Chicago, Illinois hearing: August 24, 1976.
- (d) Dallas, Texas hearing: September 21, 1976.

SUMMARY OF HEARING DATES

- 1. Washington, D.C.: June 7, 1976.
- 2. San Francisco, California: July 12, 1976.
- 3. Chicago, Illinois: September 13, 1976.
- 4. Dallas, Texas: October 12, 1976.

Issued: March 2, 1976.

WILLIAM D. DIXON,
Presiding Officer.

[FR Doc.76-5914 Filed 3-1-76;8:45 am]

RENEGOTIATION BOARD

[32 CFR Parts 1450, 1451, 1470, 1471, 1472, 1473, 1474, 1475, 1477, 1480, 1498, 1499]

RENEGOTIATION

Revised Procedures

The Renegotiation Board pursuant to section 109 of the Renegotiation Act of 1951, as amended (50 U.S.C.A., App. 1219 et seq.), proposes to issue the following regulations not less than thirty (30) days after the date of this publication in the **FEDERAL REGISTER**.

These proposed revisions of the Board's regulations are necessary to implement certain recently announced changes in the Board's organization. Under the new organization, which will be in full operation after amendments to the regulations have been adopted, the Board has endeavored to place more of the decision-making responsibility with the statutory Board, where the authority rests. Under the revised regulations, an Eastern Regional Office in Washington, D.C. and a Western Regional Office in Los Angeles, each headed by a Regional Office Manager, will replace the Eastern Regional Renegotiation Board and the Western Regional Renegotiation Board.

Interested persons are hereby notified that any comments to be considered must be presented to the Renegotiation Board, 2000 M Street, NW., Washington, D.C. 20446, on or before April 1, 1976.

Written material or suggestions submitted will be available for public inspection during regular business hours in the library at the Board office at the above address.

Dated: February 26, 1976.

R. C. HOLMQUIST,
Chairman.

PART 1450—EMPLOYEE RESPONSIBILITIES AND CONDUCT

This part is amended in the following respects:

§ 1450.735-2 [Amended]

1. Section 1450.735-3(a) is amended by deleting "including the regional boards".

§ 1450.735-3 [Amended]

2. Section 1450.735-3(b) is amended by deleting "regional board" and inserting "regional office".

3. Section 1450.735-3(d) is amended by deleting "regional board" and inserting "regional office".

4. Section 1450.735-42(a) through (l) are revised with new paragraphs (k) and (l) added to read as follows:

§ 1450.735-42 Employees required to submit statements.

(a) General Counsel, Associate General Counsel, and Assistant General Counsels.

(b) Director, Office of Planning and Development.

(c) Director, Office of Administration.

(d) Director of Operations.

(e) Director, Office of Screening, Compliance and Exemptions.

(f) Director, Office of Financial Analysis.

(g) Supervisors, Compliance Section and Screening and Exemptions Section, Office of Screening, Compliance and Exemptions.

(h) Supervisors, Accounting Section and Analysis Section, Office of Financial Analysis.

(i) Managers and Assistant Managers of Regional Offices.

(j) Supervisors, Accounting and Supervisors, Renegotiating, Regional Offices.

(k) Executive Assistant to the Chairman of the Board, and special assistants to members of the Board.

(l) Attorneys, accountants, financial analysts and business analysts in grades GS-13 and above.

PART 1451—SCOPE OF RENEGOTIATION BOARD REGULATIONS UNDER THE RENEGOTIATION ACT OF 1951, AND DEFINITIONS APPLICABLE THERETO

This part is amended in the following respects:

1. In the Table of Contents § 1451.32 is revised to read:

Sec.
1451.32 Regional Office and Regional Office Manager.

2. Section 1451.32 is revised to read:

§ 1451.32 Regional Office and Regional Office Manager.

The term "Regional Office" means a regional office created by the Board for purposes of the "Delegation of Authority to Regional Office Managers" dated _____ 1976. (See _____ FR _____)

The term "Regional Office Manager" means the manager of a regional office appointed by the Board.

PART 1470—INFORMATION REQUIRED OF CONTRACTORS

This part is amended in the following respects:

§ 1470.3 [Amended]

1. Section 1470.3(f) is amended by deleting "Washington, D.C. 20446" and inserting "and the regional offices of the Board."

§§ 1470.90-1470.92 [Amended]

2. Sections 1470.90, 1470.91 and 1470.92 are amended by deleting "Regional Boards" each place it appears and inserting "regional offices of the Board".

PART 1471—ASSIGNMENT OF CONTRACTORS FOR RENEGOTIATION

This part is amended in the following respects:

§ 1471.1 [Amended]

1. Section 1471.1 is amended by deleting "Regional Board" in the first and second sentences and inserting "regional office" and by deleting the last sentence.

§ 1471.2 [Amended]

2. Section 1471.2(a) is amended by deleting "Regional Board" in the first and second sentences and inserting "regional office".

3. Section 1471.2(b) is deleted and § 1471.2(c) is redesignated as § 1471.2(b) and revised to read:

(b) The regional office to which the case is assigned will notify the contractor of the assignment.

4. Sections 1471.2 (d) and (e) are deleted.

5. Section 1471.4 is revised to read as follows:

§ 1471.4 Reassignment to Board.

A case will be reassigned from a regional office to the Board as set forth in § 1472.4 of this subchapter.

PART 1472—CONDUCT OF RENEGOTIATION

This part is amended in the following respects:

1. In the Table of contents § 1472.3 is revised to read:

Sec.
1472.3 Conduct of renegotiation by Regional Office.

§ 1472.2 [Amended]

2. Section 1472.2(b) is amended by deleting "the case has been assigned to a Regional Board" in the second sentence and inserting "just prior to the assignment of the case to a regional office".

3. Section 1472.2(c) is amended by deleting "Regional Board" each place it appears and inserting "regional office".

4. Section 1472.2 is amended by adding a new paragraph (d) to read as follows:

(d) *Transitional provisions.* (1) Except as otherwise provided in subparagraphs (d) (2) and (3) of this section, all cases pending in a regional board on the effective date of the amendments to these regulations (_____ FR _____, 1976) will be processed in accordance with the amended regulations.

(2) With regard to cases pending in a regional board on _____, 1976, in which a renegotiation conference has already been held pursuant to § 1472.3, the contractor may elect to have its case processed under the revised regulations

Item 3a

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of
A PROPOSED TRADE REGULATION
RULE FOR FOOD ADVERTISING.
[16 CFR Part 437]

To: Honorable William D. Dixon
Presiding Officer

NOTIFICATION OF INTEREST

Pursuant to the Final Notice issued March 2, 1976 with regard to the above designated proposed trade regulation rule (Final Notice), the Association of Advertisers, Inc. (ANA) files the within statement of its interest with respect to the issues designated in the Final Notice, or any others that may be added thereto in the course of the hearings to be held as referred to in the Final Notice.

The ANA is a trade association incorporated under the Not-For-Profit Corporation Law of the State of New York and with its main office at 155 East 44th Street, New York, New York.

Founded in 1910, it is composed of some 400 or more companies which use advertising as an important part

of their sales, marketing or corporate communications programs. They are the advertisers -- the sponsors -- and membership is restricted to such companies. It does not include either advertising media or advertising agencies.

ANA's basic purposes are to represent its members' interests as buyers and users of national advertising, and to safeguard and enhance the essential values in advertising as a vehicle for economic growth and well-being.

Apart from the fact that all use advertising, the ANA membership is highly diversified. A very large portion of the biggest users of advertising are members of ANA, but, nonetheless, approximately one-third of the membership invests less than one million dollars annually in advertising space and time. Similarly, a sizable proportion of companies that participate in ANA are basically consumer package goods concerns. Many others, however, are industrial, or soft goods or automotive, or what-have-you advertisers. In brief, ANA's ranks contain virtually all industrial classifications which use national advertising, and companies which market to all segments of our population.

ANA includes within its membership more than 65 advertisers of food products whose media expenditures per year are well in excess of \$1,000,000,000.

ANA's interest in the issues specified in the Final Notice is, therefore; (1) in their potential impact directly upon food advertisers and food advertising, and (2) in their possibly precedential effects upon non-food advertisers and advertising.

ANA's position in general with respect to every such issue is that none of them should be resolved in such a manner as (1) to restrict, in any manner or form, the use of any advertising that is not "false", "deceptive", or "unfair", within the true meaning of the Federal Trade Commission Act, or (2) in any manner to violate the rights of any advertiser under the First Amendment of the United States Constitution, or (3) to restrict in excess of what is essential to prevent "false", "deceptive", or "unfair" advertising the freedom of any advertiser to exercise its own judgment as to the manner and nature of its advertising.

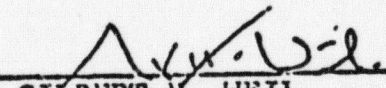
Dated: New York, New York

March 5, 1976

Respectfully submitted,

Association of National
Advertisers, Inc.
155 East 44th Street
New York, New York 10017

By: WEIL, GUTTMAN & DAVIS

By: 

GILBERT H. WEIL
60 East 42nd Street
New York, New York 10017
(212) 687 - 8573

Item 3b

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of
A PROPOSED TRADE REGULATION
RULE FOR FOOD ADVERTISING.
[16 CFR Part 437]

To: Honorable William D. Dixon
Presiding Officer

PETITION BY ASSOCIATION OF NATIONAL
ADVERTISERS, INC. TO ADD ISSUES FOR
CONSIDERATION

Pursuant to the Federal Trade Commission's procedures and rules of practice, §1.13(d)(2), the Association of National Advertisers, Inc. (ANA) respectfully petitions the Presiding Officer to add to the issues already designated herein pursuant to §1.12(a) issues numbered 1-8 and 114-127 of ANA's PROPOSAL IDENTIFYING ISSUES OF SPECIFIC FACT, JULY 24, 1975 (copy attached hereto).

It is respectfully submitted that ANA's said proposed issues further explicate and specify the sub-issues subsumed under the Commission's initial proposal and explanation of the sections of the within rule that will be involved in the first phase of hearings as designated in the Final Notice, dated March 2, 1976. Thus,

their inclusion will complete and more precisely crystallize and define the issues of fact which have to be resolved as predicates to policy and legal determinations regarding the Commission's proposed rule provisions. Further, it will aid interested parties to particularize more discriminatingly and precisely the discrete areas and limits of their interest, thus facilitating the Presiding Officer's groupings of interested parties for purposes of cross-examination.

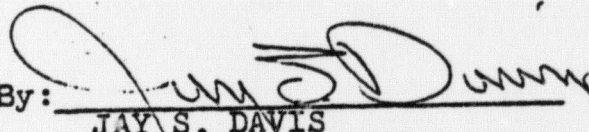
Dated: New York, New York

April 12, 1976

Respectfully submitted,

Association of National
Advertisers, Inc.
155 East 44th Street
New York, New York 10017

By: WEIL, GUTTMAN & DAVIS

By: 

JAY S. DAVIS
60 East 42nd Street
New York, New York 10017
(212) 687 - 8573

Section 437.1(g)

1. Is clear and conspicuous disclosure in food advertising, in the particular manner defined, necessary (a) to prevent consumer deception, or (b) to prevent such failures to disclose as are material with respect to the consequences of using the advertised food product under the conditions prescribed in its advertisement or under the conditions that are customary or usual for said product, or (c) to prevent violation in such advertising of an independent law or commonly accepted moral or ethical standard with consequent injury to competitors or consumers; particularly in light of food labeling pursuant to the Food, Drug and Cosmetic Act and regulations promulgated thereunder?

2. Are the answers to the above questions applicable to every advertisement for every nutrient and for every food product, or do they depend upon the nature of a particular advertisement, of a particular nutrient, of a particular food, of the particular labeling of the product, or of a particular combination thereof?

3. Is clear and conspicuous disclosure in the particular manner defined feasible within the limitations of broadcast advertising; of outdoor advertising; of point-of-purchase advertising; of car-card advertising; and of various forms of print advertising?

4. Is the answer to the above question applicable to every advertisement for every nutrient and for every food product, or does it depend upon the nature of a particular advertisement, of a particular nutrient, of a particular food, of the particular labeling of the product, or of a particular combination thereof?

5. Does clear and conspicuous disclosure as defined, if it is feasible, permit the detailed and technical information that must be disclosed to be "easily understood ... by the casual observer"?

6. Is the answer to the above question applicable to every advertisement for every food product, or does it depend upon the nature of a particular advertisement, of a particular nutrient, of a particular food, of the particular labeling of the product, or of a particular combination thereof?

7. Is clear and conspicuous disclosure, as defined, the only manner of disclosure that is capable of achieving the preventive effects described in questions 1(a), 1(b) and 1(c) above?

8. Is the answer to the above question applicable to every advertisement for every nutrient and for every food product, or does it depend upon the nature of a particular advertisement, of a particular nutrient, of a particular food, of the particular labeling of the product, or of a particular combination thereof?

Section 437.8(a)

114. Is the contribution to or supplying of energy by a food limited to, definable by or measurable by only its caloric content?

115. To what extent, if any, does the public understand from an advertising representation that a "food or nutrient contains, produces, provides, enhances, or is a source of 'energy' or 'food energy', or [by the] use [of] any other word, demonstration or depiction of similar import," that energy is not measurable in calories?

116. Is the answer to the above question applicable to every advertisement for every nutrient and for every food product, or does it depend upon the nature of a particular advertisement, of a particular nutrient, of a particular food, of the particular labeling of the product, or of a particular combination thereof?

117. Where an advertisement makes a representation as described in question 115 above is it unfair to the public in the sense of violating an independent law or commonly accepted moral or ethical standard to the injury of competitors or consumers, if such advertisement is silent as to the calories contained in a stated serving of the advertised food, and does not state that "energy" or "food energy" is supplied by calories?

118. Is the answer to the above question applicable to every advertisement for every nutrient and for every food product, or does it depend upon the nature of a particular advertisement, of a particular nutrient, of a particular food, of the particular labeling of the product, or of a particular combination thereof?

119. (A) To what extent, if any, does an advertisement such as described in question 117 above cause, by its said silences, substantially adverse consequences as the result of using the advertised product under the conditions prescribed in such advertisement or under such conditions as are customary or usual?

(B) What are such consequences?

120. Are the answers to the above questions applicable to every advertisement for every nutrient and for every food product, or do they depend upon the nature of a particular advertisement, of a particular nutrient, of a particular food, of the particular labeling of the product, or of a particular combination thereof?

Section 437.8(c)

121. Is the contribution to or supply of energy by a food limited to, definable by or measurable by only its calorie content?

122. To what extent, if any, does the public understand from an advertising representation that consumption of a food enhances or contributes to a person's vigor, energy, alertness, strength or endurance that such benefits are not measurable in part in calories?

123. Is the answer to the above question applicable to every advertisement for every food product, or, does it depend upon the nature of a particular advertisement, of a particular food, of the particular labeling of the product, or of a particular combination thereof?

124. Where an advertisement that makes a representation as described in question 122 above is silent as to the role of caloric values of the food in contributing to a person's vigor, energy, alertness, strength or endurance, and is silent as to the calories in a stated serving of the food, is it by virtue of such silence an unfair act or practice in the sense of violating some independent law or commonly accepted moral or ethical standard to the injury of competitors or consumers?

125. Is the answer to the above question applicable to every advertisement for every food product, or does it depend upon the nature of a particular advertisement, of a particular food, of the particular labeling of the product, or of a particular combination thereof?

126. (A) To what extent, if any, does an advertisement such as described in question 124 above cause, by its said silences, substantially adverse consequences as the

result of using the advertised product under the conditions prescribed in such advertisement or under such conditions as are customary or usual?

(B) What are such consequences?

127. Are the answers to the above questions applicable to every advertisement for every food product, or do they depend upon the nature of a particular advertisement, of a particular food, of the particular labeling of the product, or of a particular combination thereof?

Item 4

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of
A PROPOSED TRADE REGULATION
RULE FOR FOOD ADVERTISING.
[16 CFR Part 437]

To: Honorable William D. Dixon
Presiding Officer

PETITION OF ASSOCIATION OF NATIONAL
ADVERTISERS, INC. TO DESIGNATE AND
SEGREGATE THE PERTINENT PUBLIC RECORD

During the forthcoming first phase hearings, the oral and written presentations will, of course, be restricted to matters that are germane to the sections and subsections of the proposed rule as delineated in the Final Notice of March 2, 1976. However, the public record as it now exists ranges over the entire spectrum of the total proposed rule and staff statement, the vast bulk of which is not relevant to the first phase.

Considerable confusion, misunderstanding and substantial needless preparation -- costly, time-consuming and entirely wasteful will be entailed if each interested party

must assume the task of individually attempting to go through that entire, massive record and undertake the risk of correctly or incorrectly determining which portions of it must be dealt with, through cross-examination, rebuttal or both. Doubts can be safely resolved only by erring on the side of expansiveness rather than construction; obviously not an end to be desired.

The Association of National Advertisers, Inc. (ANA), therefore, hereby petitions that the Presiding Officer publicly identify, at least thirty (30) days prior to the commencement of hearings, those documents, or portions thereof, which shall relate to the first phase, and that they be ordered to constitute the sole public record up to the time of the hearings for the purposes of the first phase.

Dated: New York, New York

April 12, 1976

Respectfully submitted

Association of National
Advertisers, Inc.
155 East 44th Street
New York, New York 10017

By: WEIL, GUTTMAN & DAVIS

By: 

Jay S. Davis
60 East 42nd Street
New York, New York 10017
(212) 687 - 8573

Item 4a

FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

BUREAU OF
CONSUMER PROTECTION

April 22, 1976

Gilbert H. Weil, Esquire
Weil, Guttman & Davis
60 East 42nd Street
New York, New York 10017

Dear Mr. Weil:

Reference is made to your letter dated April 12, 1976 with which you enclosed a Petition By Association of National Advertisers to add to the issues already designated issues numbered 1-8 and 114-127 of ANA's proposal dated July 24, 1975. The petition explains that their inclusion will complete and more precisely crystallize and define the issues of fact which have to be resolved and will aid interested parties to particularize more discriminatingly the discrete areas and limits of their interest, thus facilitating the Presiding Officer's groupings of interested parties for purposes of cross examination.

You are advised that the process of grouping is virtually complete based upon the Notifications of Interest already submitted pursuant to the issues designated in the Final Notice of March 2, 1976. In the designation of issues incorporated therein, careful consideration was given to all of the issues in ANA's proposal of July 24, 1975, as well as all the other numerous proposals received. The final list actually included in the Final Notice represented my best effort at a determination of all the issues involved in the first phase of this proceeding which met the statutory criteria of disputed issues of material fact which are necessary to resolve. All the issues which were proposed in response to the Initial Notice which were not included in the Final Notice were not so included because, in the judgment of the Presiding Officer, they failed in one respect or another to meet that criteria.

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Gilbert H. Weil, Esquire

page 2

This is not to say that all of the issues rejected are not important to a consideration of the proposed Rule or that they should not be addressed by witnesses in their testimony. It is simply that in the opinion of the Presiding Officer they are not necessary to resolve by the technique of cross examination at the hearing.

With this in mind, I have again reviewed the issues incorporated in your petition and have concluded that they do not meet the criteria set out in the statute or that they fall within the issues already designated. Consequently, your petition to add additional issues is denied.

Very truly yours,

William D. Dixon

William D. Dixon
Special Assistant Director
for Rulemaking

Item 5

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ASSOCIATION OF NATIONAL ADVERTISERS, INC

Plaintiff,

v.

FEDERAL TRADE COMMISSION, et al.

Defendants.

76 CIV

AFFIDAVIT

CITY OF WASHINGTON }
DISTRICT OF COLUMBIA } ss.:

Stephen A. Weitzman, being first duly sworn deposes and says:

1. I am a principal in Stephen A. Weitzman, P.C., and have been retained by Weil, Guttman & Davis to act as local council to the Association of National Advertisers, Inc. ("ANA") and to perform certain services for it in connection with ANA's participation in the Federal Trade Commission's Food Advertising Trade Regulation Rule Proceeding ("TRR").

2. As part of my duties I am responsible for the collection indexing and review, at the earliest possible moment, of all documents entered into the rulemaking and public records in the TRR proceeding, maintaining contacts with Commission personnel, including the Presiding Officer, in connection therewith, and in performing certain other procedural and operational activities on behalf of Weil, Guttman & Davis or ANA.

3. The public record in this proceeding, even before the publication of the Presiding Officer's ("P.O.") final notice of March 2, 1976 consisted of more than 15,000 pages which spanned the entire spectrum of issues to be resolved in the entire Trade Regulation Rule as proposed.

4. By the P.O.'s final order, the issues to resolve in

this TRR were segregated into three distinct phases, the initial phase dealing with sections 437.1(a)-(b), (e)-(h); (d)-(h); 437.6, 437.8(a)-(d); 437.9, and 437.10 of the proposed TRR.

5. In carrying out my duties on behalf of ANA, my staff during April and May requested of the Commission Public Document Room all documents contained in the rulemaking record. To that end, members of my staff made a list of all documents contained in the rulemaking record and found that approximately 25,000 pages of them were not in my possession nor that of ANA. The great bulk of this 25,000 pages were not entered into the public record until April 28-30th, when the record for comments was closing and were submitted by FTC staff. These staff documents were segregated into the P.O.'s category "G".

6. These 25,000 pages can be broadly segregated into two groups the first consisting of approximately 8,000 pages and the second approximately 13,000 pages. The latter of these groups comprise assorted segments of the record entered into the Dietary Food Hearings held before the Food and Drug Administration, and was certified as authentic by the Food and Drug Administration on March 30, 1976.

7. In response to my inquiry of the Commission's Public Document Room on June 9, 1976, I was informed that the 8,000 page group of documents would be available to me by June 16, 1976. I requested at that time that documents be made available as they were copied and segregated rather than waiting until the entire mass of documents had been processed. During that week of June 9th, I was also told that the second group of 13,000 documents would be similarly available during the week of June 16th. On June 14, 1976 I instructed a clerk from my office to obtain copies of the

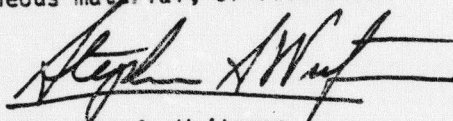
documents which had been processed and I was informed by him that he was told that the copies of the documents were not segregated from the original documents and thus the copies could not be taken from the Public Documents Room. On June 16, 1976, after meeting with the Presiding Officer, I went to the Public Documents Room and finding all documents packaged and ready for transmittal to ANA, immediately had them picked up and returned to my office.

8. I have personally reviewed many of those documents entered into the rulemaking record by Commission staff and enter this affidavit on behalf of ANA in support of its complaint filed in the within court for injunctive relief.

9. In reviewing the documents no set procedure was used, but rather subcategories of documents were reviewed at random, with reference to indexes and tables of contents where appropriate, to determine the relevance of them to phase 1 of the TRR hearing.

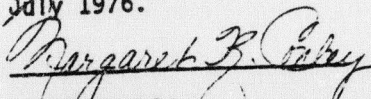
10. A detailed description and analysis of the documents is contained in Attachment 4 to Appendix Item 8 and is hereby incorporated herin by reference.

11. The documents entered into the rulemaking record by the staff are not limited or related solely to those matters which have been designated by the P.O. as properly under consideration in phase 1 of the Trade Regulation Rule, rather, they include much extraneous material, of little or no relevance to it.


Stephen A. Weitzman

Sworn to before me this 20th day of

July 1976.


Notary Public

MY COMMISSION EXPIRES APRIL 23, 1979

Item 6

FEDERAL TRADE
COMMISSION
RECEIVED

JUN 11 '76

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

SPECIAL ASSISTANT
DIRECTOR
FOR RULE MAKING

In the Matter of
A PROPOSED TRADE REGULATION
RULE FOR FOOD ADVERTISING.
16 CFR Part 437

PUBLIC RECORD

NO. 215 - 40

Petition by the Association of
National Advertisers, Inc. for
a Ruling Rescheduling Hearings

TO: Hon. William D. Dixon
Presiding Officer

By petition dated May 13, 1976, the Association of National Advertisers, Inc. ("ANA") sought a six month delay of the Phase I hearings on the proposed TRR to provide for sufficient time to review and analyze the voluminous material which was placed on the rulemaking record by the staff. Such review and analysis is necessary for ANA or any other interested parties to properly prepare for the cross-examination of persons to whose testimony such documents would be relevant.

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The Presiding Officer, by a Notice dated May 20, 1976 (Exhibit A hereto) and as explained in his letter dated May 20, 1976 (Exhibit B hereto), denied ANA's petition but nonetheless rescheduled the hearing to be held in Washington, D.C. to November 15, 1976. The Phase I hearings are currently set to begin in San Francisco on July 12, 1976.

In his explanatory letter the Presiding Officer said, in pertinent part:

I can see no justification for six months delay in this proceeding and believe the additional five weeks hereby provided should afford all interested parties adequate time for any additional preparation they feel might be required. (Exhibit B, pp. 1-2.)

And, as regards the FOIA materials referred to by ANA, the Presiding Officer observed:

(T)he FOIA materials are not physically part of the rulemaking public record. . . You will remember that those materials are matters of public record, but they are not a part of the rulemaking record. Hence, they play no part in my consideration of your Petition. (Exhibit B, p. 1.)

A. The Additional Time

Taking the five-week hiatus first, it is self-evident that the Presiding Officer's provision for additional time has been nullified since, as of this date, more than four weeks after ANA's initial petition, none of the 20,000 pages of documents in the rulemaking record in question has been made available to it for review and analysis. ANA has now been informed that the Public Record documents will be available by June 16, 1976.

Therefore, the five-week additional time period provided by the Presiding Officer will have been consumed with no change in the status quo as of the time the original extension was granted for study of the involved documents for purposes of cross-examination at the forthcoming hearing. The purpose for which that postponement was intended has not been served, even in part.

Further, even that five weeks of additional time is woefully inadequate. For one thing, upon receipt of those documents, each page must be checked for legibility and new legible copies of any illegible pages must be obtained from the FTC. Since we are seeking only one copy of all these documents, we must then provide copies of the approximately 20,000 pages for our interested members for their study of all these materials. We are thereby unburdening the Commission's already over-taxed duplication facilities and personnel resources by taking over that task of duplication ourselves.

Beyond that, an application of simple mathematics dictates that a more lengthy period within which to accomplish ANA's own study is needed. Assuming that there are approximately 20,000 pages of documents which must be analyzed for assimilation into plans for cross-examination (including FOIA material, discussed infra), the bulk of which were withheld by the staff until the final minute, and assuming further that this could be done at the rate of two minutes per page

(a virtual human impossibility), twenty man-weeks would be required for that effort. Actually, the documents involved will certainly need more than that cursory perusal.

Therefore, ANA respectfully renews its petition that, for the reasons earlier set forth, a six month postponement be granted.

B. The FOIA Documents

The Presiding Officer states that the FOIA materials are not physically part of the rulemaking record and thus not considered by him. However, they were sought by ANA in a request explicitly related directly to this proceeding, because of their germaneness to its issues. Thus, even though the staff has not seen fit to enter these documents into the rulemaking record, ANA, or any other interested party, may, after reviewing them, have as much reason to use them for cross-examination as those on the rulemaking record itself. Any schedule of hearing must take into consideration the time necessary for their review.

For the reasons stated above and in ANA's previous petition, the hearings in this matter should be postponed for six months.

Dated: New York, New York
June 11, 1976

Respectfully submitted,
Association of National
Advertisers, Inc.
155 East 44th Street
New York, New York 10017

By: WEIL, GUTTMAN & DAVIS

By: Gilbert H. Weil / jlg

GILBERT H. WEIL
60 East 42nd Street
New York, New York 10017
(212) 687-8573

FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

[16 CFR Part 437]

FOOD ADVERTISING

Notice of Change of Dates for the
Washington, D.C. Hearings on
Proposed Trade Regulation Rule

On March 2, 1976, the Presiding Officer published in the Federal Register (41 F.R. 8980) Final Notice of proposed trade regulation rulemaking proceedings concerning Food Advertising. The Notice included a schedule of dates and places of public hearings to be held in that proceeding.

As published in such Final Notice the date set for commencement of the hearings in Washington, D.C. was June 7, 1976. This date has now been changed to November 15, 1976. Thus, public hearings will be held commencing on November 15, 1976 at 9 a.m. in Washington, D.C., Room 332, Federal Trade Commission Building, Pennsylvania Avenue at 6th Street, NW., Washington, D.C.

Since it is now anticipated that the Washington D.C. hearings will be of longer duration than those of the other sites selected, persons desiring to present their views orally in Washington should so inform the Commission's representative listed below no later than September 21, 1976:

Ms. Lois Dimore [202-724-1489],
Division of National Advertising,
Bureau of Consumer Protection,
Federal Trade Commission,
Washington, D.C. 20580.

All other provisions of the Final Notice of March 2, 1976, including the dates and places of the other hearings, remain the same and the instructions and requirements set forth therein should be observed.

Issued: May 20, 1976.

William D. Dixon

William D. Dixon,
Presiding Officer.

FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

BUREAU OF
CONSUMER PROTECTION

May 20, 1976

Gilbert H. Weil, Esquire
Weil, Guttman & Davis
60 East 42nd Street
New York, New York 10017

Dear Mr. Weil:

This is in response to your Petition dated May 13, 1976, on behalf of your client, the Association of National Advertisers, for a rescheduling of the hearings currently set for the proposed Trade Regulation Rule involving Food Advertising. Your Petition requests that each hearing date presently set for phase one of these proceedings be postponed for six months.

In justification of this request you refer to the fact that substantial amounts of material have been recently inserted into the public record by the Commission's staff and that you will need the additional time to study this material and make the determinations listed on pages 5 through 7 of your Petition. Your Petition also seems to be based, at least in part, upon those materials which were made public earlier in response to ANA's Freedom Of Information Act request.

I find the latter references somewhat confusing and would deal with them first by stating that the FOIA materials are not physically part of the rulemaking public record. Due to an internal error in communications they were for a short time inserted into the rulemaking record, but on May 6, 1976, I instructed our records section to remove them from that record as not properly a part thereof. You will remember that those materials are matters of public record, but they are not a part of the rulemaking record. Hence, they play no part in my consideration of your Petition.

Turning then to the remainder of your Petition, you will note from the enclosed Notice that I am only granting your request to the extent of rescheduling the Washington, D.C. hearings to commence on November 15, 1976, instead of on June 7, as they are presently set. Since all other provisions of the Final Notice remain the same, including the dates and places of the other hearings, the public hearings will thus commence in San Francisco on July 12, 1976. I can see no justification for six

Gilbert H. Weil, Esquire

page 2

months delay in this proceeding and believe the additional five weeks hereby provided should afford all interested parties adequate time for any additional preparation they feel might be required.

In so doing, I think I should add that I do not intend this action to be interpreted as agreement on my part with the reasoning which formed the foundation for your Petition. I do not assent to the proposition that any violation of the Commission's own Operating Manual has occurred or that interested parties are necessarily entitled to any specific amount of time to accomplish all your stated objectives with respect to all documents which might be inserted into the written record at the close of the comment period. All I am undertaking to do here is to exercise the discretion given me to accommodate the wishes of interested parties to the extent I can without unnecessarily delaying the proceeding. Here it would seem that the rescheduling accomplished by the enclosed Notice achieves that purpose.

Very truly yours,

William D. Dixon

William D. Dixon
Presiding Officer

Enclosure

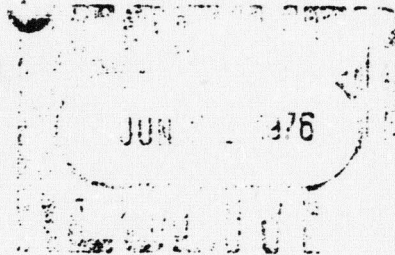
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-88a-

Item 7

FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

BUREAU OF
CONSUMER PROTECTION



June 16, 1976

Gilbert H. Weil, Esquire
Weil, Guttman & Davis
60 East 42nd Street
New York, New York 10017

Dear Mr. Weil:

This is in response to your Petition dated June 11, 1976, on behalf of your client, the Association of National Advertisers, requesting that the hearing dates presently set for Phase One of the proposed Trade Regulation Rule involving Food Advertising be postponed for six (6) months.

In an earlier Petition (May 13, 1976), you made a similar request, citing as justification therefor the need of your client, as well as of other interested parties, for adequate time in which to review and analyze the "voluminous material which was placed on the rulemaking record by the staff" and properly prepare for cross-examination of appropriate parties, prior to the commencement of the hearings. Although that Petition was denied by my Notice of May 20, 1976, I did at that time reschedule the Washington, D.C. hearings to commence on November 15, 1976, thus allowing an additional period of five (5) weeks for preparation. Your current Petition asserts that the effect of this additional period was nullified as, on June 11, 1976, none of the "20,000 pages" of Public Record documents had been made available to your client; instead, your client was advised that the documents would be available by June 16, 1976.

In fact, between June 9-11, 1976, some 8,000 pages of these documents were available for pickup by your client, and although Mr. Stephen Weitzman was so notified and expressed

Gilbert H. Weil, Esquire

-2-

his intention of calling for them on June 10, 1976, they remained with the Public Records Section. I understand that on this date, June 15, 1976, some 23,000 documents consisting of 21,000 pages of materials from the Food Advertising record and 2,000 pages of Freedom of Information Act materials requested by your client are awaiting pickup from the Public Records Section.

Of the approximately 13,000 pages of the Food Advertising record that were not ready for delivery to your client by June 11, 1976, most were copies of Food and Drug Administration transcripts which were already matters of public record and available to your client through that agency.

Regarding my previous refusal to consider the Freedom of Information Act (FOIA) materials in Docket No. 209-11 in determining whether a postponement of the hearings was warranted, I must once again call your attention to the fact that these materials are not a part of the Food Advertising rulemaking record and that your client's review and use of same is left entirely to its own discretion. As such, this material will not figure in my consideration of the postponement request made in your current Petition.

It appears to me that all interested parties have been afforded adequate time for preparation for the hearings, given the availability of significant portions of the record and the nature of the remaining documents. I, therefore, can see no justification for postponing the hearings or for further modifying the schedule as it now stands. Accordingly, your Petition is denied.

Sincerely,

William D. Dixon

William D. Dixon
Presiding Officer

Item 8

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of
A PROPOSED TRADE REGULATION
RULE FOR FOOD ADVERTISING.
[16 CFR Part 437]

PUBLIC RECORD
NO. 215-40

To: Honorable William D. Dixon
Presiding Officer

Petition of Association of National Advertisers, Inc.
to Expunge from the Public Record all Submissions Made
thereon by the Staff of the Commission on April 28-30,
1976, and to Condition Their Re-Submission of All Future
Statements, Oral or Written, by Any Interested Party,
upon a Showing of Reasonable Relevancy to the Issues
Involved in the First Phase of the within Proceeding.

SPECIAL ASSISTANT
DIRECTOR
FOR RULE MAKING

JUN 28 '76

FEDERAL TRADE
COMMISSION
RECEIVED

The Commission's notice of the within proposed trade regula-
tion rule (TRR) making proceeding (40 F.R. 23086, May 28, 1975)
covered vast ground even insofar as its specific proposals are
concerned. Beyond that, it opened its vistas to amorphous and
unconfined expanses (improperly, ANA maintains 1/) by thrusting
the staff's proposals into the hearings notwithstanding its ex-
plicit and official rejection of them for inclusion into the TRR,
and by similarly opening the hearings to statements, cross-examina-
tion, rebuttals and the various stages of comment on a number of
non-proposals. (§§ 437.6, 437.9 and 437.10.)

In brief, FTCA §18(b)(1) calls for publication of a "proposed"
rule and, "with particularity the reason for" it. What the Commis-
sion has published, in the above respects, is not a proposed rule;
instead it is a proposal to hold hearings as to what rule it might
or might not propose at some future date.

By the same token, it has not stated with particularity the reasons for a proposed rule (which would be impossible, as there is no such proposal to be thus rationalized), but, rather a search for such reasons.

The difference is material, and the Commission's non-observance of the statute prejudicial. When a rule is specifically proposed, and the reasons for it furnished with particularity, parties interested in it, or in any of its segments, can confine their expenditure of time, money and manpower, all highly valuable resources to just those areas which are delineated by such a notice. Those resources certainly are not unlimited; especially for private persons, smaller and medium sized firms, but as well for even the largest corporations. Unstructured hearings, on the other hand, would compel parties desiring to participate effectively to cover every possible rule that might eventuate, and every reason that could conceivably be advanced to support a result which might be adverse to the party's interests. The economic strain of such participation would be prohibitive to many and unjustified for all.

Much the same considerations pertain, but even more strongly, to the subject of the within petition.

By his Final Notice Regarding Proposed Trade Regulation Rule (issued March 2, 1976), the presiding officer herein (PO) separated the total proceeding into three phases, isolating only sections 437.1(a), (b), (e), (f), (g), (h); 437.2(d), (e), (f), (g), (h); 437.6; 437.8(a)-(d); 437.9, and 437.10 to be taken up in the first (present) phase. (41 F.R. 8980, March 2, 1976.) He

ordered that witnesses and commenting parties might address themselves to " . . . those sections of the proposed rule for which a final notice of proposed rulemaking is being hereby published ..." (idem. p. 8981), and " . . . to those sections which are noticed for public hearings . . . " (idem, p. 8982); and he set a parallel delimitation upon the issues that would be considered. be considered. 2/

Presumably, the reason for establishing three separate phases of hearings and for circumscribing the scope of the first one is to conserve the time, effort and expense of all parties interested in the matters embraced in only one or two of the phases. It allows them to direct their efforts and confine their attendance to only those more narrowly focused materials and occasions. 3/

Prior to the Final Notice of March 2, 1976 multitudinous comments had been submitted on the public record for all the areas covered by the commission's entire TRR, and by the staff's statement as well. Deeming that the task of searching through that haystack for such needles as might be germane to only the first phase of hearings would be an inordinately time consuming and needlessly expensive one for most of the interested parties, and that it would be shamefully wasteful in the duplication required for multiple parties to do it, each for itself, ANA petitioned the PO to make such a segregation and exclude the irrelevant portions of the gross public record from the public record for only the first phase. A copy of that petition, dated April 12, 1976 is annexed hereto as Attachment 3. The petition was denied in a ruling by the PO dated April 22, 1976. Perhaps it might have been more appropriately the function of the

Commission's staff to perform the sorting task, but the PO could have so ordered, sua sponte.

Be that as it may, as shown by the attached Weitzman affidavit, the Commissions staff, with full knowledge of the limitations of the Final Notice of March 2, 1976, indiscriminately and uncondonably dumped into the public record for the first phase approximately twenty-five thousand pages of documents. ANA did not actually receive copies of them until June 16, 1976. A quick sampling shows them to be largely, if not mostly, quite irrelevant to the first phase and its specified issues. Not many illustrations are needed to make manifest the outrageousness of the staff's tactic.

The documents essentially fall into general categories: advertising, transcripts and documents from legal proceedings, FTC cases, expert and consumer comments, correspondence addressed to FDA and marketing information.

Even a limited sampling and examination of each of these groups shows with what utter disregard, if not calculated transgression, the staff has treated the Final Notice of March 2, 1976. For example:

1) A random sample of the several hundred pages of the G(1 & 2)d category, Transcripts and Documents from Legal Proceedings (SAW affidavit, para. 7) shows largely irrelevant data - technical information Federal Register Notices and amendments to them relating to Foods for Special and Dietary Uses; Food Label Information Panel; Nutrition Labeling. (See SAW affidavit, para. 7).

The FDA Dietary Food Hearing material submitted by Staff present the most egregious abuse of the rulemaking record. It comprises 21 bundles of documents totalling more than 13,000 in number. Two thousand seventy-five (2,075) pages of transcript contained in bundles 1-3 were reviewed by sampling every fiftieth page of that group. Less than 5 percent contains information of relevance to Phase I. (Attached to the Weitzman affidavit is a sub-sample of every tenth page of the sample. A review of them will clearly indicate the meaninglessness of the bulk of the transcript.)

The documents contained in bundle 6 contain lengthy articles and publications and include such topics as the food energy in brewer's yeast and how to calculate the nutritive value of home prepared foods (SAW affidavit, para. 8B).

Relevant information contained in over 200 pages of FDA Hearing Examiner findings in the hearings can be distilled to only a portion of 17 pages (SAW affidavit, para. 8C), and relevant direct testimony in bundle 13 can be compressed even further. For example, two paragraphs out of 25 pages, and five lines of a 22 page portion of testimony appears relevant, the balance being irrelevant prepared statements and curriculum vitae.

Consumer comments contained in bundle 19 do not address this proceeding but were directed to the FDA hearings (SAW affidavit, para. 8I).

As to category G(6 & 10)h-2, reference to the table of contents of that document shows that eight of eleven chapter

titles bear no relevance to Phase I.

The result of deluging the record of a proceeding such as this with masses of irrelevant materials is, whether deliberate or not, to obstruct meaningful participation by interested parties to a point of impossibility for most and of extreme difficulty and constriction for the rest. If, in order to cross-examine or rebut with respect to one or more specific issues, a party must wade through thousands upon thousands of documents that have nothing to do with the hearing (plus the inescapable burden of dealing with those which are relevant to a proper issue) the consumption of resources of every kind necessary in that illusory chase will make supposed public involvement in rulemaking proceedings a cynical pretense.

Beyond that, ultimate judicial review must be based upon "the rulemaking record . . . taken as a whole" [15 U.S.C. 18(e)(3)(A)], which record must be filed in its entirety with the court [15 U.S.C. 18(e)(1)(A)]. The onerousness of the above-described burden imposed upon persons interested in taking part in the hearings must be faced again if they wish to appeal from a promulgated TRR.

And, to that must be added the unjustifiably additional work imposed upon the court to process and deal with voluminous irrelevant records; not to mention the increased administrative and operational costs to the commission itself at both the hearings and the appellate stage.

Unquestionably, in principle a precedent should not be set of allowing indiscriminate, undisciplined and uncontrolled loading of

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a rulemaking public record with however much of whatever anyone wants to put into it. The facts outlined above leave no doubt that here is a situation that squarely challenges the principle.

If the Commission's staff can do in any trade regulation rulemaking proceeding what it is testing here, it can so stifle meaningful public opposition by burying it in a paper avalanche as to choke off the true opportunity contemplated by 15 U.S.C. §18(c)(1) for private parties of all means and sizes to advance or defend their own interests. Certainly, a safeguard is needed that materials and testimony in a public record bear some reasonable relevancy to the issues in the proceeding.

There is no point in having divided the within proceeding into three phases if there can be put into the record of the first phase matters pertinent only to the second one or the third; or to none at all.

There is no point in having refined the scope of even the first phase still further by the specification of the issues to be considered therein if matters appropriate only to other issues, or to none at all, can nevertheless be stuffed into its record.

As shown above, ANA's partial analysis of staff's massive submission of April 28-30, 1976 reveals that the vast bulk of it may well be irrelevant to any of the issues involved in the first phase of hearings. There should be no burden imposed upon ANA to extend its study throughout all the documents, for if that were made the private party's obligation the staff's objective would become a fait accompli. Rather, in view of ANA's strong prima

facie demonstration, the burden must now rest upon the staff to justify what it has done.

Section 1.13 (c) (1) of the Commission's Procedures and Rules of Practice dictates that the presiding officer "shall be responsible for the orderly conduct of the rule making proceeding" and gives him "all powers necessary to that end". The staff's cavalier ignoring of the presiding officer's specifications and designations for the first phase of the hearings is disorderly, obstructive, and prejudicial. Section 1.13 (c) (1) (6) gives him the power, if he wishes to exercise it, to compel the staff to attend or to respond to recent questions as to what efforts, if any, it exercises to keep its submissions within the proper bounds of the first phase.

ANA, therefore, respectfully:

PETITIONS, as the most efficient way of assuring that result, that the materials placed into the public record by the Commission's staff on or materials placed into the public record by the Commission's staff on April 28-30, 1976 be expunged from the record, with permission granted course of the forthcoming hearings upon a proper showing of their reasonable relevance to one or more of the issues involved in the first phase of the within rulemaking proceeding.

ANA FURTHER PETITIONS that all future materials and testimony offered by any party be entered into the record of the said proceeding be received therein only subject to the same preliminary showing.

ANA FURTHER PETITIONS, in view of the imminency of hearings as soon as July 12, 1976, and in view of the fact that compelling ANA to go through any of the hearings before this petition is finally ruled upon would, in effect, moot its basis and deny ANA an adequate remedy, that the PO stay, or postpone, such hearings until he has ruled upon the within petition, and thereafter for a sufficient time to allow ANA to appeal to the Commission from such ruling if it is adverse to ANA; and, because the time is so short, if the ruling is adverse,

ANA FURTHER PETITIONS, on the basis of all that has been set forth above, that along with such ruling the PO certify in writing to the Commission, pursuant to section 1.13(c)(2)(i) of the Commission's Procedures and Rules of Practice, that his said ruling involved a controlling question of law and of policy as to which there is substantial ground for difference of opinion and that an immediate review of the ruling may materially advance the ultimate termination of the proceeding, and the subsequent review will be an inadequate remedy.

Dated: New York, New York

June 25, 1976

Respectfully submitted,

Association of National
Advertisers, Inc.
155 East 44th Street
New York, New York 10017

By

Gilbert H. Weil
Gilbert H. Weil
Weil, Guttman & Davis
Office & P.O. Address
60 East 42nd Street
New York, New York 10017
(212) 687-8573

1. ANA made its position clear on this point with regard to the staff's statement at pages 1-2 of its Proposal Identifying Issues of Specific Fact July 24, 1975, a copy of which is annexed hereto as Attachment 1, and reiterated it as to the "reserved" portions of the TRR in its Notification of Interest (March 5, 1976) at page 1, a copy of which is annexed hereto as Attachment 2.
2. "Set forth below are the issues which the Presiding Officer has determined to designate under Section 1.13 (d) (1) of the Commission's Procedures and Rules of Practice. Pursuant to statute and the Commission's Rules of Practice, testimony with respect to these issues . . ." (emphasis added). The thereafter designated issues relate only to the sections and subsections of the TRR listed at page 4 above.
3. One of the reasons given for the partition was that "staff . . . is considering recommending to the Commission that the sections dealing with [certain sections excluded from the first phase] be revised and republished prior to hearings. The staff's continuing consideration of these sections, . . . suggests that further refinement of these provisions prior to hearings may eliminate unnecessary issues and otherwise enhance the rulemaking process."
(41 F.R. 8980, March 2, 1976)
4. Under date of June 16, 1976 the PO denied ANA's petition for a postponement of hearing dates necessitated, in ANA's view, by the time required for it to study and prepare upon the staff's voluminous submission, as late as April 30, 1976, copies of which ANA, even by June 11, 1976, had still not been able to obtain. A copy of ANA's said petition is appended hereto as Attachment 5, and of the ruling as Attachment 6.

Att. 1

-103a-

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of
A PROPOSED TRADE REGULATION RULE
ON FOOD ADVERTISING (40 FED. REG.
23086 ET SEQ., MAY 28, 1975)

PROPOSAL IDENTIFYING ISSUES OF
SPECIFIC FACT-FOOD ADVERTISING

Pursuant to the invitation extended at page 23087 of the Federal Register of May 28, 1975, the Association of National Advertisers, Inc. (ANA), 155 East 44th Street, New York, New York, by its general counsel, Gilbert H. Weil, Weil, Lee & Bergin, 60 East 42nd Street, New York, New York, proposes that the attached issues of fact have been raised by the above captioned proposal and are necessary to be resolved in connection therewith.

ANA wishes to clarify the within submission in two respects:

1. It does not deem and has not proposed any material issues of fact arising out of the staff's statement, as distinct from the Commission's own proposal. ANA fully appreciates and respects the Commission's effort to

evaluate that statement with the aid of public comment, and will, to the extent that its resources of time, manpower and dollar permit, respond thereto in all good faith. At the same time, however, it cannot be overlooked that to undertake a full evidentiary preparation and presentation to rebut the staff's factual premises and record submissions would involve a drain upon such resources that would not be warranted in view of the fact that the staff's proposals are not those of the Commission itself and have not been formally made a part of an official trade regulation rulemaking proceeding. As stated above, ANA will nevertheless do what it can to cooperate with the Commission's effort within the indicated limits.

2. Many of the attached proposed issues of fact are addressed to the exercise of the Commission's administrative discretion rather than to its legal authority. To illustrate, while ANA submits that the Commission has not been invested with power to promulgate trade regulation rules calculated only to improve the nutritional state of the nation through educational or informational advertising, and is limited strictly to rulemaking that is reasonably calculated to prevent unfair or deceptive advertising within the meaning of FTCA §5(a), it has proposed issues of fact,

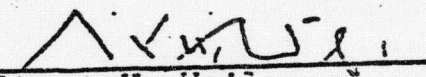
such as numbers 150-156, dealing with the extent of national malnutrition, and with the effectiveness of the Commission's proposed educational and informational content for certain food advertisements to rectify it. The reason for this is that even if the Commission had the authority which we have said above we do not believe it enjoys, we would submit that a full evidentiary airing of the said issues would dictate that, in its wise and responsible exercise of administrative discretion, it should not exercise such power by promulgating its proposed rules, because of the disproportionately high economic and competitive costs they would impose in relation to the meager benefits they would produce.

Dated: New York, New York

July 24, 1975

Respectfully submitted,

Association of National
Advertisers, Inc.
155 East 44th Street
New York, New York 10017

By 
Gilbert H. Weil
Weil, Lee & Bergin
Office & P.O. Address
60 East 42nd Street
New York, New York 10017
(212) 687 - 8573

ATTACHMENT 4

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of
A PROPOSED TRADE REGULATION
RULE FOR FOOD ADVERTISING
16 CRF Part 437

PUBLIC RECORD No. 215-40

AFFIDAVIT

Stephen A. Weitzman, being first duly sworn,
deposes and says:

1. I am a principal in Stephen A. Weitzman, P.C.,
local counsel to petitioner, Association of National Adver-
tisers, Inc. (ANA).

2. As part of my duties, I am responsible for
the collection, indexing and review of the documents entered
into the rulemaking and public record in this proceeding.

3. In the latter part of April and in early May
my office made several requests for all of the documents in
the public record. Members of my staff went to the FTC
public document room and made a list of all documents, by
category and number of pages, approximately 25,000 pages of
which were not in our possession. The vast majority of
these were not received into the public record until
the last three days of April, closing time for comments,
and were submitted by the Staff of the FTC ("G" category).

The Staff documents may be divided into two sets, the first set consisting of 8,000 pages and the second set, over 13,000 pages. The latter group comprises assorted segments of the record in the FDA Dietary Food Hearing.

On June 9, 1976, not having received any of the 8,000 pages of documents, and having been told that they were being prepared and would be ready by June 16th, I requested that we be allowed to obtain the documents as they became ready. Later that week I was also informed that the 13,000 pages of documents were going to be photocopied and would be available during the week of June 16th.

The 8,000 pages of documents, or some of them, are said to have been available the afternoon of June 10th but I was not aware of their availability at that time. On June 14, 1976, I instructed a clerk from my office to obtain the copies of documents which were then ready, and was informed by him that he was told the copies were not separated from the originals and could not be taken. The following afternoon June 16, 1976, after meeting with the Presiding Officer I went to the Public Documents Room and found all the documents packaged and ready. I immediately had them picked up and returned to my office.

As to the 13,000 pages of FDA Dietary Food Hearing documents obtained by FTC Staff, part of the approximately 50,000-60,000 or more pages of the FDA Hearing Record, no suggestion was made by the Presiding Officer or the Staff that they may be obtained from FDA.

The Presiding Officer's memorandum transmitting the documents to the Public Document Room contains only a one paragraph description and, standing alone, is not a sufficient guide to identify these documents. A list of the FDA documents that were actually entered into the Public Record accompanied the documents turned over to us on June 15, 1976. It was included within the bundles of pages and not discovered until June 22nd while the documents were being control numbered, after page 8939.

4. I have reviewed many of those documents entered into the rulemaking record by the Commission Staff and enter this affidavit on behalf of ANA in support of its petition.

5. The Staff submissions have been grouped by the Presiding Officer into Category G, and attached hereto as Exhibit A is a set of transmittal memoranda prepared by him which indexes that category by number. The numbering system indicates the category, section of the rule to which the documents relate, and a sub-category arranging the documents by ultimate source. For example, G(1 & 2)a-1 represents category G; sections 437.1 and 437.2, "(1 & 2)"; advertisement "(a)" and document number 1 "-1" in this sub-category.

6. In reviewing the documents for the purpose of this affidavit, no set procedure was used, but rather sub-categories of documents were reviewed at random, with reference to indices and tables of contents where appropriate, to determine the relevance of them to Phase I of the hearing.

7. G(1 & 2)d: Transcripts and Documents
from Legal Proceedings

This group of documents contains Federal Register notices and includes major food labeling regulations proposed or promulgated by FDA from 1971 to the present. They contain notices on Nutrition Labeling, Food Label Information Panel, Labeling for Cholesterol, Fats, and Fatty Acids, Foods for Special Dietary Use (as relating to vitamin and mineral compounds), Labeling of Flavors, Spices, Colorings and Chemical Preservatives, Exemptions from Food Labeling Requirements, etc. A list of subjects covered is included in document G(1 & 2)d-3, Exhibit B. From the titles of these documents alone it is obvious that only a few might be directly relevant to the subject matter of Phase I.

Three flagrant examples of irrelevant documents are: the notices on imitation food, subject of proposed 437.4 - not involved in any way in Phase I of this proceeding; standards of identity for special dietary supplements of vitamins and minerals addressed largely to restrictions on composition of these products - not relevant to Phase I; and, a booklet entitled "Compliance Procedures for Nutrition Labeling" which consists of only a statistical guide for technical analysts - it has no relevance to Phase I.

8. G(6 & 10)d-1: Dietary Food Hearing

These documents were transmitted to the Staff by the FDA Hearing Clerk in 21 bundles which the staff placed intact into the record of its proceeding. The Staff's description of these documents (Exhibit C) states that the materials were selected as relevant to 21 CFR Section 125.2 (b)(1) through (b)(6), (identical to Proposed 16 CFR Section 437.10(a)(1) through (6)). However, the presiding officer in his pre-hearing order for Phase I states:

Those statements which are prohibited in labeling by 21 CFR Section 1.17(1)(2), (3), (4) and (6) and by 21 CFR Section 125.2(b)(2), (3), (4) and (6) and which would be prohibited in advertising by the staff's proposed Section 437.10(a)(2), (3), (4) and (6) have been found by the Commissioner of the Food and Drug Administration to be scientifically false.

Since the validity of those findings are not part of this proceeding, no issues as to those sections have been designated.

Accordingly, no materials pertinent to Section 125.2(b)(2), (3), (4) and (6) are relevant yet the materials placed in the record cover the above sections plus all of the other issues of the Dietary Food Hearing.

A. Bundles 1-3 (2,075 pages)

The first three bundles contain Dietary Food Hearing Record transcript - 2075 pages.

I reviewed at least every fiftieth page for relevance. Attached as Exhibit D is a sub-sample of that sample of pages.

It is apparent that, though some pages contain testimony relevant to Section 125.2 (b)(1) and (5) much of the transcript includes qualifying statements, background statements as to relevance, issues as to labeling and FDA powers, objections of counsel, material relevant to Section 125.2(b)(2), (3), (4) and (6) - MDR's and Part 80 relating to standards of composition of vitamin and mineral products.

In my judgment less than 5% of these pages appear relevant to Phase I.

B. Bundle 6

These documents were marked G(8)(j) which as I understand it means documents related to energy claims and not to Section 437.10. After leafing through it I noted one page of one brochure for Schiff Yeast with "The Food Energy Stored in Brewer's Yeast", ads for non-food items, price information and order forms. Included too in this group were USDA Handbook No. 8 - Composition of Foods and a U.S. pamphlet entitled Procedures for Calculating Nutritive Values of Home Prepared Foods. These two lengthy publications appear to have no relevance to either Sections 437.8 or 437.10.

C. Bundle 10 - Legal Briefs

This group of documents, legal briefs, proposed findings and findings for the entire Dietary Food Hearing, contains summaries of testimony and legal arguments about FDA's statutory authority under the Food and Drug Act. The subject matter covered includes material on vitamin composition, artificial sweeteners, diabetics, weight control, and scope of the term "food for special dietary use".

The table of Contents to the FDA Presiding Examiner's Report, covering more than 200 pages of Findings, shows that conclusions on 125.2 are contained within 17 pages. And, examination of those pages shows that only a portion relate to 125.2(b)(1) and (5).

D. Bundles 12 & 13

Bundle 12 consists of written direct testimony from the FDA Special Dietary Food Hearings. The vast majority of this testimony refers to matters not relevant to Phase I of the FTC proceeding, including topics such as the extent of malnutrition in the country, fortification of foods, substitute foods, meal replacements, and the degree of vitamin deficiency in the American diet. Exhibit E contains a sampling of these documents.

The documents in bundle 13 contain the entire direct testimony of many witnesses at the FDA hearings, including curriculum vitae.

For example, the testimony of Dr. Frederick J. Stare (WD-65-Stare) consists of a 10 page statement, a twenty-five page curriculum vitae with 2 paragraphs on 125.2(b) (1) at 13Q and 13A. The testimony of Dr. Joseph J. Vitale consists of a ten page curriculum vitae, and a 12 page statement, five lines of which relate to §125.2(b) (1).

The documents include testimony of FDA witnesses Dr. Rachmiel Levine on Diet and Diabetic Issues, and Walter R. Moses' 150 page statement on Diet, Diabetic and "low calories" issues.

E. G(8)(e) [FTC Cases]

This bundle contains case materials, complaints and opinions. Included are the "Amstar Case" [e-1], "Lite Diet" Bread (Bakers Franchise) [e-2] and Dannon Milk Products [e-5] cases.

The majority of the pages in the AMSTAR materials are the formal paragraphs included in all FTC complaints, proposed orders and final orders. It also includes corrective advertising material.

The "Lite Diet" case relates to dietary foods for weight control, the regulations for which have not yet been promulgated by FDA. The definitions of a diet food is not a subject of this proceeding. None of the materials examined at random in this entire set of documents speaks to the issue of whether calories should be disclosed in advertising.

G. Bundle 17

Bundle 17 consists of letters and articles, some scientific, which were made part of the record of the FDA Special Dietary Food Proceeding. A random sample of this articles shows that most are not relevant to this proceeding. Included in the random sample reviewed are articles on weight and obesity, refined foods, protein intake and deficiency, vitamins such as folic acid and pantothenic acid, flouridation of water, pesticides such as dieldrin and heptachlor, death rates, stilbestrol, and case histories of ill patients who were treated by changing their diet. A sample of documents in this bundle is attached as Exhibit F.

H. Bundle 18: Letters to Commissioner (1966)

This group of documents contains letters to then FDA Commissioner Goddard objecting to the compositional restrictions of the Dietary Food Regulations, and has no pertinence to the issues or particular sections covered by Phase I. One letter, page 1957, contains a comment on natural vitamins; however, comments before and after related to the prescription issue.

I. Bundle 19: Comments Supporting Regulation - Consumer

Bundle 19 contains some comments generally supportive of FDA regulation of Dietary Foods but not pertinent to the issues set forth by the Presiding Officer for Phase I. Other documents discuss "diet" products, plants and soil, e.g., an article on flower and plant growth using seaweed as a fertilizer, called "Iris and Trace Elements", FDA's limits on vitamin composition, more comments on the sale of vitamins by prescription and numerous repetitive petitions objecting to FDA regulations on constitutional grounds.

9. G (6 & 10) h-2 [Marketing Data]

Reference to the table of contents of this document shows that eight of eleven chapters are not relevant to Phase I. The irrelevant chapters are:

- Health Food Producers (II)
- Marketing Health Foods (III)
- Nutritive Supplements (V)
- Cereal Products (VI)
- Protein Foods (VII)
- Sweeteners, Jams and Jellies (VIII)
- Fruit Juices, Dried Fruits and Herbs (IX)
- Possible Effects of the Energy Crisis on Health Food Production and Sales (XI)

Sworn to before me this
28th day of June, 1976.

Marshall R. Cohen

Stephen A. Weitzman
STEPHEN A. WEITZMAN

Item 9

FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

BUREAU OF
CONSUMER PROTECTION

July 1, 1976

Gilbert H. Weil, Esquire
Weil, Guttman & Davis
60 East 42nd Street
New York, New York 10017

Dear Mr. Weil:

Reference is made to your Petition dated June 25, 1976, on behalf of the Association of National Advertisers, to Expunge from the Public Record all Submissions Made thereon by the Staff of the Commission on April 28 - 30, 1976, and to Condition Their Re-Submission of All Future Statements, Oral or Written, by Any Interested Party upon a Showing of Reasonable Relevancy to the Issues Involved in the First Phase of the within Proceeding.

It is noted that this is another in a series of Motions and petitions involving the staff submissions to the record all of which, if granted, would have the same effect, namely, delay in the proceeding. It is also noted that I did grant your first petition to the extent that I postponed the start of the hearings in Washington from June to November in order to afford all parties more time in which to study this material. Further, I have noted that this Petition is essentially similar to that filed by you on April 12, 1976 wherein you requested that I designate and segregate the public record by identifying those documents which relate to the first phase. This Petition was denied on April 22, 1976 and the reasons there given could virtually serve as an adequate response to your most recent one.

I do not think it is fair to imply bad faith on the part of the staff in this matter. On the contrary, they did place in the record a considerable volume of material pertaining to the entire rule in an effort to be as helpful and as informative as possible. While I did recognize your need for more time in order to study the documents, I do not think fairness dictates that I now go to the extremes you request, particularly since that would disrupt the entire proceeding and postpone the start

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of the hearings for an indefinite period of time. This is particularly true since I remain of the view, as expressed in my April 22nd letter, that even if we were going forward to hearings on the entire proposed rule as originally published, each interested party would still be faced with the task of determining what portions of the record bore upon those aspects of the proposal which now comprise the first phase. The instant Petition simply requests me to do with a portion of the record that which I declined to do previously with respect to the whole.

It appears that we view this proceeding differently. You apparently feel that the fact that we are going forward to hearings on the first phase only converts this into an entirely new proceeding based upon a separate and distinct record. On the contrary, hearings are being held at this time on the first phase only in order to make this a more manageable proceeding for the reasons stated in my Final Notice. The sections to be covered in the first phase do not constitute a new rule. They are part of the same rule and that rule continues to be based upon the same record. Hence, attempts to segregate that record or portions thereof seem to me to be particularly inappropriate at this time. Viewed in this light, it does not seem proper to describe what has taken place as an effort to frustrate full and fair participation by all concerned.

In light of this conclusion on my part, there remains no need to stay or postpone the start of the hearings on July 12, 1976 and I am further of the view that there is no need to certify the matter to the Commission.

Accordingly, your Petition is denied.

Very truly yours,

William D. Dixon

William D. Dixon
Presiding Officer

-109a-

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Plaintiff's affidavit by

Bruce R. Hafner

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JUL 23 1976
S. D. OF N. Y.

JUDGE CANNELLA

ASSOCIATION OF NATIONAL ADVERTISERS, INC.,

Plaintiff,

76 CIV.

v.

FEDERAL TRADE COMMISSION, et al.

Defendants.

AFFIDAVIT
76 CIV. 3277

STATE OF NEW YORK :

:

COUNTY OF NEW YORK :

Bruce R. Hafner being duly sworn deposes as follows

1. He is an attorney associated with the firm of Weil, Guttman & Davis, attorneys of record for the plaintiff herein, and has been involved as an attorney for said plaintiff in the matters leading up to and forming the basis of this action, and is familiar with the details thereof.

2. The allegations made in the complaint herein are true, and are incorporated herein by reference.

This action arises out of a trade regulation rulemaking proceeding being conducted by the Federal Trade Commission (the Commission, or FTC) under 15 U.S.C. §§57a (a)(1)(B) and 57a(c). A copy of the pertinent portion of the statute will be found as Item 1 in the Appendix furnished as part of the within motion.

3. The purpose of the within action is to protect plaintiff's (sometimes hereinafter referred to as ANA) rights, as a person interested in said rulemaking, from being materially obstructed and impaired, virtually to the point of extinction, by the commissions' toleration of the record therein being deluged with tens of thousands of pages of documents having no relevancy to the matters or issues involved in the pending hearings therein.

4. If "an interested person" is to exercise thoroughly and meaningfully the rights of cross examination and rebuttal congress

provided for him under 15 U.S.C. §57a(c) he must, of course, study everything that goes into the record of the proceeding in order to identify so much of it as pertains to his interest and, then, to do with it as seems best to him. In any extended proceeding it is a considerable undertaking at best; but if, as here, no measures are taken to limit the record to that which is reasonably germane to the proceeding, - if anyone, including the commissions' own staff can, as here, put anything and everything it wishes into that record, regardless of relevance (no control has been exercised in the subject proceeding over the introduction of materials into the public record; anything that has been submitted has automatically gone into it) - the task of coping with the exploded volume can become prohibitive at some level for any interested person, and the congressional intent thus subverted. That is what this lawsuit and the within application for preliminary relief are about.

5. In the May 28, 1975 issue of the Federal Register (40 F.R. 23086 et seq.) The commission published a final notice of proposed promulgation of a trade regulation rule (TPR) for food advertising, thus formally initiating a proceeding under 15 U.S.C. §§57a(a) (1) (D) and 57a(b)-(d). A copy of said notice appears as Item 2 in the Appendix herewith. Patently, it covers a wide range of issues. The proposed Trade Regulation rule was initially published for comment on November 11, 1974 (39 Fed. Reg. 30242, et seq.), a copy of which appears as Item 2a in the Appendix hereto.

6. Plaintiff is advised, and believes, that annual national sales of products whose advertising would be covered by the proposed TPR amount to \$113 billions of dollars, and that advertising expenditures for them, per year, are well in excess of \$2.5 billion dollars. (Statistical Abstract of the United States, 1975, p. 743).

7. Plaintiff, Association of National Advertisers, Inc., is a not-for-profit Corporation organized, existing and doing business under the laws of the State of New York, having its principal place of business at 155 East 44th Street, New York, New York 10017. ANA, founded in 1910 is composed of over 400 companies that utilize the advertising media to bring information about their products and services to the attention of consumers and the public. ANA's basic purposes are to represent its members' interests as buyers and users of national advertising and to safeguard and enhance the essential values in advertising as a vehicle for economic growth and well being. Its membership is highly diversified.

A very high proportion of the largest users of advertising belong to it, but nonetheless, approximately one-third of its membership invests less than one million dollars annually in advertising space and time. Included among ANA's members, are companies which manufacture and market food products and which advertise extensively to market and promote them. In brief, ANA's ranks contain virtually all industrial classifications that use national advertising, and companies which market to all segments of the population.

8. Because leading food advertisers form an important segment of ANA's membership, it has actively participated in the above referred to TRR proceeding. It has filed a notification of interest therein pursuant to 16 C.F.R. §1.13(d) (3), as well as written comments proposing issues for consideration pursuant to 16 C.F.R. §1.13(b), and the Presiding Officer (P.O.) for the proceeding has notified ANA that he has designated it as one of the group representatives for the hearings therein under 16 C.F.R. §1.13(c) (1) (v).

9. Under date of March 2, 1976 the P.O. issued a Final Notice Regarding Proposed Trade Regulation Rule, pursuant to 16 C.F.R. §§1.12 and 1.13(c) (1) (i). It was published in the Federal Register for March 2, 1976 (41 Fed. Reg. 8980 et seq.), and a copy of it appears as Item 3 in the Appendix herewith.

10. The P.O., by the said Final Notice, separated the total TRR proceeding into three phases, and designated as the only sections of the TRR to be taken up at the present time (the first phase) 437.1(a)-(b), (e)-(h); 437.2(d)-(h); 437.6, 437.8(a)-(d), 437.9, and 437.10. He ordered that witnesses and commenting parties might address themselves to "... those sections of the proposed rule for which a Notice of proposed rulemaking is being hereby published. (Appendix, Item 3, page 8991) and "... to those sections which are noticed for public hearings ..." (idem, page 8982); and he set a parallel delimitation upon the issues that would be considered. 1/

11. Presumably the P.O.'s reason for establishing three separate phases of hearings and for circumscribing the scope of the first one was to conserve the time effort and expense of all parties interested in only one or two of the three phases, by allowing them to direct their efforts and confine their attendance to only those more narrowly focused materials and occasions. One of the reasons the P.O. gave for his partition was: "... the staff ... is considering recommending to the Commission that the sections dealing with [certain sections excluded from the first phase] be revised and republished prior to hearings. (continued)

1/ "Set forth below are the issues which the Presiding Officer has determined to designate under §1.13(d) (1) of the Commissions' procedures and rules of practice to be considered in accordance with §1.13(d) (5) and (6) of the procedures and rules of practice. Pursuant to statute and the Commissions' rules of practice, testimony with respect to these issues ..." (idem, page 8982). The thereafter designated issues relate only to the sections and subsections of the TRR listed in paragraph 10 above, and they, of course, are the only sections to which "those sections of the proposed rule for which a final notice of proposed rulemaking is being hereby published" has reference.

The staff's continuing consideration of these sections, ... suggests that further refinement of these provisions prior to hearings may eliminate unnecessary issues and otherwise enhance the rulemaking process." (Appendix, Item 3, page 8980.)

12. Prior to the P.O.'s Final Notice, well over 15,000 pages of comments had been submitted on the public record, encompassing all the areas covered by the entire TRR and by the staff's statement as well; and much of it exceeding even those bounds of relevancy. The Commission permitted anyone who wanted to do so to put anything the person desired, in any quantity, into the record of the TRR proceeding free of any criteria of relevance, materiality, competency or anything else.

13. After issuance of the P.O.'s final order, ANA, perceiving the needless expense, time and effort that would have to be consumed in searching through that entire mass of paper less it overlook some content somewhere within it that would be relevant to the limited scope of subject matter and issues designated by the P.O. for the first phase of hearings, and also with an eye to the great waste that would be involved in separate interested persons having to duplicate the task, each for himself, petitioned the P.O. to segregate and to exclude from the record of phase 1 those portions of the gross public record which were irrelevant and inapplicable to it. A copy of that petition, dated April 12, 1976, appears as Appendix Item 4. ANA's petition was denied by the P.O. by letter dated April 22, 1976 (Appendix Item 4a).

14. On April 28-30, 1976 the Commissions' staff unloaded approximately 25,000 pages of further documents into the TRR record, copies of which ANA was unable to obtain until June 16, 1976 (see accompanying affidavit of Stephen A. Weitzman, Esq., Appendix Item 5). Most, if not all thereof had been in the staff's possession or control long prior to that date.

15. The staff thus acted despite a) its knowledge of the requirement imposed upon it by the Commissions' Operating Manual which governs the conduct of its staff: "The Commission has directed that, absent special circumstances warranting a different course, evidentiary material considered in connection with the formulation of proposed Trade Regulation Rules should be placed upon the public record in order to insure the fullest and most meaningful participation in the rulemaking proceeding by interested members of the public and those most likely to be affected by the rule", and b) its knowledge of the restricted scope set by the P.O. for the first (and only operative) phase of hearings on the TRR.

16. As is more fully set forth in the accompanying Weitzman affidavit (Appendix Item 5), only a quick sampling was needed to indicate the probability that the vast bulk of the belatedly submitted documents is not relevant or pertinent to the said first phase of hearings.

17. In view of the fact that the first hearing within phase 1 was scheduled to commence on July 12, 1976 (the originally scheduled hearing of May 18, 1976 had been cancelled), ANA when it learned that in all likelihood it would not be able to obtain copies of the above mentioned 25,000 (approximately) pages of record documents until the middle of June, petitioned the P.O. to postpone the hearings until ANA would have had adequate opportunity to study them in preparation for said hearings. A copy of that petition, dated June 11, 1976, appears as Appendix Item 6. The P.O. denied the petition in a ruling dated June 16, 1976, a copy of which appears as Appendix Item 7.

18. As expeditiously as possible after having obtained copies of the said documents ANA, based upon its hasty sampling of them, referred to above and in the accompanying Weitzman affidavit, petitioned the P.O., based upon ANA's discovery of the

probability of a high level of their irrelevance, to expunge them in their entirety from the record of phase 1, but without prejudice to the Commission's staff's ability to reoffer them and then have them readmitted into the record contingent upon a reasonable showing of relevance to the first phase of the hearings. A copy of that petition appears as Appendix Item 8. In addition to ANA's petition for such expungement, it also a) requested that all future submissions by any interested persons be placed in the record of the first phase only upon a reasonable showing of relevance thereto, b) requested, because of the shortness of time, that if the Presiding Officer ruled adversely to ANA's petition he simultaneously certify his ruling for immediate review by the Commission in accordance with 16 C.F.R. 1.13(c) (2) (i), and c) requested, because of the shortness of time that the P.O. stay, or postpone, the hearings until after ANA's petition had been finally ruled upon, lest its basis be rendered moot and ANA be thereby deprived of an adequate remedy. Under date of July 1, 1976 the P.O. denied the above referred to petition. A copy of his denial appears as Appendix Item 9.

19. All rulings of the P.O. that have been referred to above are, under 16 C.F.R. §1.13(c)(2)(i), final decisions at this time on behalf of the Commission as they are not subject to review by it until it finally reviews the entire proceeding. By that time ANA will no longer have any adequate remedy for the wrongs it seeks to be righted in this action; it will have been irremediably injured.

20. Those wrongs are of three fundamental natures. The first needs little exposition; it is the Commission's denial of adequate time for ANA to prepare itself for the July 12, 1976 hearing with respect to approximately 25,000 pages of documents made available to it for its study and preparation as late as June 16, 1976 (Appendix Item 5.) Even if the P.O.'s defense of his

ruling ("In fact, between June 9-11, 1976, some 8,000 pages of these documents were available for pick up by your client") were not denied in the accompanying Weitzman affidavit (Appendix Item 5), it could make little difference in substance. The four to six day difference on those pages with approximately 17,000 still left until later to be obtained surely makes no real change in the picture. The other two wrongs are somewhat related in their impact upon ANA. They are a) the Commission's inclusion in the TRR proceeding of the subject matter indicated by sections 437.6, 437.9 and 437.10 (Appendix Item 2a, pages 39844 and 39845), which do not consist of proposals for a rule but rather of proposals for discussion of whether a proposals for rules should be made in the future; and b) the Commission's lack of any concern over or protection against the record being swamped with materials of no moment to the proper scope of the TRR proceedings hearings and their duly designated issues.

21. In brief, section 57a(b)(1) of the Federal Trade Commission Act (FTCA) calls for publication of a "proposed rule" and, "with particularity the reason for it". What the Commission has published, under TRR section numbers 437.6, 437.9 and 437.10 is not a "proposed rule" ; instead, it is a proposal to hold hearings as to what rule it might or might not proposed at some future date. By the same token, the Commission has not stated "with particularity the reason for" a proposed rule. That would be an impossibility in the absence of a proposal to be rationalized. Instead it has given notice of an intention to search for reasons which would, in turn, if deemed appropriate by the Commission, lead ultimately to some proposed rule or other.

22. The differences are material, and the Commission's non-observance of the statutory requirements is prejudicial to interested persons, including ANA. When a rule is specifically proposed, and the reasons for it furnished with particularity, such interested persons can confine their expenditure of time,

money and manpower, all highly valuable resources, to just those areas and reasons which are delineated by such a notice. Such resources certainly are not unlimited; especially for private persons, smaller and medium size firms, but as well for even the largest corporations. Unstructured hearings, on the other hand, would compel persons desiring to participate effectively to cover every possible rule that might eventuate out of the Commission's horizonless exploration, and to anticipate and deal with every reason that could conceivably be advanced to support a result which might be adverse to that person's interests. The economic strain of such participation would be prohibitive to many and unjustified for all.

23. Much the same considerations pertain, though even more strongly, to the Commission's allowance of the record of the first phase to be made a dumping ground for anything anyone wants to pile into it regardless of whether it bears or does not upon the formerly specified subject areas and issues thereof, or, indeed, upon any other aspects of the TPR as proposed. The result of deluging the record of the hearings with massive irrelevancies is, whether deliberate or not, to obstruct meaningful participation by interested parties to a point of impossibility for most and of extreme difficulty and constriction for the rest. If, in order to cross examine or rebut with respect to one or more specific issues, an interested person must wade through thousands upon thousands of pages of documents that have nothing to do with the hearing, plus the inescapable burden of dealing with those which are relevant to a properly identified issue, the consumption of resources of every kind necessary in that illusory chase will make supposed public involvement in rulemaking proceedings a cynical pretense.

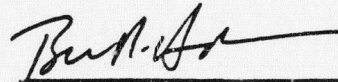
24. Beyond the above, ultimate judicial review must be based upon "the rulemaking record ... taken as a whole" 15 U.S.C. §57a(e) (3) (A), which record must be filed in its entirety with the

reviewing court 15 U.S.C. §57a(e)(1)(A). The onerousness of the above described burdens imposed upon persons who will be interested in taking part in the hearings must be faced again if they wish to appeal from a TRR as promulgated by the Commission. To that burden upon them must be added the unjustifiably additional work imposed upon the court to process and deal with voluminous, irrelevant records, - not to mention the increased administrative and operational costs to the Commission at both the hearing and appellate stages.

25. Unquestionably, in principal a precedent should not be established of allowing indiscriminate, undisciplined, and uncontrolled loading of a rulemaking public record with however much of whatever anyone wants to put into it. The facts outlined hereinabove leave no doubt that the present is a situation which squarely challenges that principal. If the Commission's staff can do in any TRR proceeding what it is being tested here, it can so stifle meaningful public opposition by burying it in a paper avalanche as to choke off the true opportunity contemplated by 15 U.S.C. §57a(c)(1) for private persons of all means and sizes to advance or defend their own interests. Certainly, a safeguard is needed that materials and testimony in a public record in a TRR proceeding bear some reasonable relevancy to the issues involved therein.

26. There is no point in the Commission's having divided the food advertising TRR proceeding into three phases if there can be put into the record of the first phase matters pertinent only to the second one or the third; or to none at all. There is no point in the Commission's having refined the scope of even the first phase still further by the specification of the issues to be considered therein if matters appropriate only to other issues, or to none at all, can nevertheless be stuffed into its record. As shown above, ANA's partial analysis of the staff's massive submission of April 28-30, 1976 reveals that the vast bulk of it

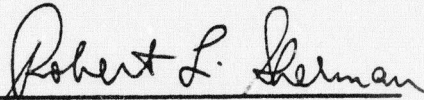
may well be irrelevant to any of the issues involved in the first phase of hearings. There should be no burden upon ANA to extend its study to embrace all of those documents, for if that were made the private parties obligation the staff's objective would become a fait accompli. Rather in view of ANA's strong prima facie demonstration, the burden should rest upon the staff to justify what it has done, in line with the fundamental and sound principal that the burden of showing relevancy belongs to the one who proposes that evidence become a part of the record.



Bruce P. Hafner

Sworn to before me this 21 day

of July 1976.



Notary Public

ROBERT L. SHERMAN
No. 52-4620086
Notary Public State of New York
Qualified in Suffolk County
Certificate filed in New York County
Commission Expires March 30, 1977

Affidavit and Order appointing Bruce R. Hafner
and Stephen A. Weitzman as process server by
Raymond F. Burghardt, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

filed:
U.S.D.C.
July 23-76
1976

----- x
ASSOCIATION OF NATIONAL
ADVERTISERS, INC.,

Plaintiff,

-against-

FEDERAL TRADE COMMISSION, CALVIN
J. COLLIER, Chairman, PAUL RAND
DIXON and ELIZABETH HANFORD DOLE,
Commissioners,

Defendants.
----- x

Judge Cannella

Order Appointing Persons
To Serve Process

Civil Action
No.

86 Civ. 3277

Upon the summons and complaint and the annexed
affidavit of Bruce R. Hafner, sworn to July 22, 1976, it is

ORDERED that Bruce R. Hafner and Stephen A. Weitzman
be appointed special agents for service of process in this
matter, pursuant to Rule 4 of the Federal Rules of Civil
Procedure.

15/ Raymond F. Borsdorff
CLERK

Dated: New York, New York
July 23, 1976

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X
ASSOCIATION OF NATIONAL
ADVERTISERS, INC.,

Plaintiff,

-against-

FEDERAL TRADE COMMISSION, CALVIN
J. COLLIER, Chairman, PAUL RAND
DIXON and ELIZABETH HANFORD DOLE,
Commissioners,

Defendants.

AFFIDAVIT

Civil Action
No.

----- X
STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

BRUCE R. HAFNER, being duly sworn, deposes and says:

1. I am an associate in the firm of Weil, Guttman & Davis, attorneys for the named plaintiff herein and not a party to this action, and submit this affidavit in support of plaintiff's request for an order appointing Bruce R. Hafner and Stephen A. Weitzman as special agents for service of the summons and complaint in this matter, pursuant to Rule 4 of the Federal Rules of Civil Procedure.

2. This action is for a preliminary and permanent injunction requiring the defendants to remove from the public record of its trade regulation rulemaking proceeding for food advertising certain irrelevant materials entered therein by defendants' staff.

3. In connection with the above action plaintiff intends to seek an immediate temporary restraining order and therefore time is of the essence.

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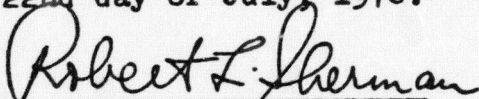
4. Deponent is advised that service by the marshal cannot be effected until sometime within the next week, and then only by certified mail. Such service would not be effective for approximately a week to ten (10) days.

5. No previous application for similar relief has been made.

WHEREFORE, I respectfully request that Bruce R. Hafner and Stephen A. Weitzman be appointed special agents for service of the summons and complaint in this matter.


Bruce R. Hafner

Sworn to before me this
22nd day of July, 1976.


Notary Public

ROBERT L. SHERMAN
No. 52-4620086
Notary Public State of New York
Qualified in Suffolk County
Certificate filed in New York County
Commission Expires March 30, 1977

Plaintiff's Notice of Motion for an
order for temporary relief

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - x

ASSOCIATION OF NATIONAL
ADVERTISERS, INC.,

Plaintiff,

76 CIV 3277 (JMC)

-against-

NOTICE OF MOTION
FOR
TEMPORARY RELIEF

FEDERAL TRADE COMMISSION, CALVIN
J. COLLIER, Chairman, PAUL RAND
DIXON and ELIZABETH HANFORD DOLE,
Commissioners,

Defendants.

- - - - - x

S I R S :

PLEASE TAKE NOTICE, that on the accompanying affidavit of Gilbert H. Weil, sworn to on August 12, 1976, the Memorandum in Support of Plaintiff's Motion for Temporary Relief, the Summons, the Complaint, the Appendix to the Complaint, and the affidavit of Bruce R. Hafner, sworn to on July 21, 1976 and heretofore filed in this Court, plaintiff will move the Court on September 2, 1976 for an order:

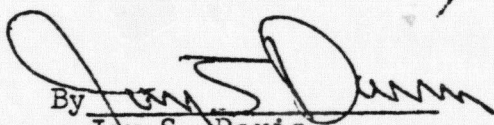
1. that the Federal Trade Commission expunge from its rulemaking record in the food advertising TRR all materials entered thereon by its staff on or about April 28-30, 1976 pending the final order herein by this Court, or

2. that stays all further hearings
by defendants in their proceeding
for a trade regulation rule for
food advertising until the within
action has been finally determined.

Dated: New York, New York
August 19, 1976

Yours, etc.

WEIL, GUTTMAN & DAVIS

By 
Jay S. Davis
Attorneys for Plaintiff
Office and P.O. Address
60 East 42nd Street
New York, New York 10017
(212) 687-8573

TO: United States Attorney
for Southern District of New York
4 St. Andrew's Plaza
New York, New York

Office of the Attorney General
of the United States
Department of Justice
Washington, D.C. 20530

Federal Trade Commission
Penna. Ave. and 6th St., N.W.
Washington, D.C. 20580

Plaintiff's affidavit by Gilbert H. Weil

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - -x

ASSOCIATION OF NATIONAL
ADVERTISERS, INC.,

Plaintiff,

76 CIV 3277(JMC)

-against-

AFFIDAVIT

FEDERAL TRADE COMMISSION, CALVIN
J. COLLIER, Chairman, PAUL RAND
DIXON and ELIZABETH HANFORD DOLE,
Commissioners,

Defendants.

- - - - -x

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

GILBERT H. WEIL, being duly sworn, deposes as follows:

1. I am a member of the firm of WEIL, GUTTMAN & DAVIS,
attorneys for the plaintiff herein, and am personally familiar
with the matters set forth below.

2. This affidavit is submitted to supplement the
affidavit of Bruce R. Hafner, Esq., sworn to the 21st day of
July, 1976 and served along with the complaint herein in support
of plaintiff's prayer for relief pending final determination of
the within action.

3. As manifest in the complaint, the Hafner affidavit,
and appendices and attachments to the complaint, this action
arises out of a trade regulation rulemaking proceeding now being
conducted by defendants pursuant to 15 U.S.C. §57a (Complaint,
Paragraph Fourth). The complaint alleges that defendants, by
swamping the rulemaking record of the proceeding with voluminous

documents regardless of their relevancy thereto, are irreparably prejudicing plaintiff's (and others') rights to participate therein (Complaint, Paragraph Thirteenth). The ultimate relief sought is that defendants be ordered to expunge all such materials from the record, subject to a right of re-introduction of so much thereof as is first shown to be reasonably relevant to the issues involved in the ongoing first phase of the proceeding (Complaint, Paragraph Eighth).

4. The first in a series of hearings under phase one (Appendix Item 3, p. 8921, *Hafner affidavit, Paragraph 10) of the proceeding was held from July 12, 1976 through July 23, 1976 in San Francisco. The next is scheduled to commence in Chicago on September 13, 1976, then another beginning October 12, 1976 in Dallas, and the fourth on November 15, 1976 in Washington, D. C.

5. In order to prepare adequately to cross-examine witnesses in such hearings and to present its own rebuttal evidence therein, plaintiff should study so much of the documents in the rulemaking record as is pertinent to the issues officially stated in defendants' "Final Notice" (Appendix Item 3) to be considered during the present phase ("phase one") of the proceeding.

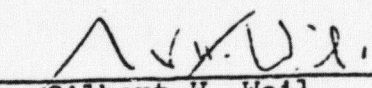
* All references to "Appendix Item" are to the appendix filed with the complaint herein.

6. If, however, before the within action is finally determined, plaintiff is compelled by the constraints of caution, in view of the timing of the oncoming hearings, to examine the mass of papers, relevant and irrelevant, that have been dumped indiscriminately into that record, its resort to this Court for relief will have been mooted, and its injury rendered irreparable and without adequate legal remedy.

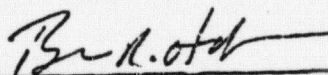
7. Also, as pointed out in the complaint and the supporting papers served and filed with it, the precedential principles involved in this case are of high importance to the matter of trade regulation rulemaking proceedings as such, and warrant definitive resolution as early in the history of their development as possible (Hafner affidavit, Paragraph 25).

For the reasons, and based upon the more detailed contents of the papers heretofore filed herein, plaintiff now moves that this Court either:

1. Order that the Federal Trade Commission expunge from its rulemaking record in the food advertising TRR all materials entered thereon by its staff on or about April 28-30, 1976, pending the final order herein by this Court, or
2. Stay further hearings by defendants in their proceeding for a trade regulation rule for food advertising until the within action has been finally determined.


Gilbert H. Weil

Sworn to before me this
12th day of August, 1976.


Notary Public

BRUCE R. HAFNER
Notary Public State of New York
No. 2421003 Qualified in Suffolk Co.
Cert. Exp. 12th in New York County
-3- Commission Expires March 31, 1977

Plaintiff's memorandum in support of
motion for temporary relief

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
ASSOCIATION OF NATIONAL
ADVERTISERS, INC.,

Plaintiff,

-against-

76 Civ. 3277

FEDERAL TRADE COMMISSION, CALVIN
J. COLLIER, Chairman, PAUL RAND
DIXON and ELIZABETH HANFORD DOLE,
Commissioners,

Defendants.

-----x

MEMORANDUM IN SUPPORT OF
PLAINTIFF'S MOTION FOR TEMPORARY RELIEF

Introduction

Plaintiff's ("ANA") motion for temporary relief arises out of its participation as "an interested person" in an ongoing Federal Trade Commission ("FTC") rulemaking proceeding on a proposed rule for food advertising [proposed 16 CFR Part 437] ("TRR"). As is discussed in greater detail below (and elaborated in the affidavits of Gilbert H. Weil, dated August 12, 1976 filed with this motion and the affidavit of Bruce R. Hafner, dated July 21, 1976 and the Appendix to the Complaint, both filed with the complaint) the FTC has caused a huge rulemaking record to be created which contains much irrelevant material and defies systematic, rational and efficient analysis. Exacerbating the problems presented by the voluminous irrelevancies contained in the rulemaking record is the schedule of hearings to be held nationwide on the TRR (Weil affidavit, ¶4). Faced with the rulemaking record and the hearing schedule, ANA cannot properly prepare for, and participate meaningfully in, the

hearings and analyze the FTC created record. Thus, ANA's fundamental rights to a fair hearing are being irremediably and immediately injured by FTC; ANA looks to this Court for a preservation of those rights.

ANA will show that decisions (Items 4a and 9)* made by the Presiding Officer ("PO") in the FTC proceeding in response to ANA's petitions to expunge certain materials from the rulemaking record in the TRR proceeding (Items 4 and 8) are, for purposes of the Administrative Procedure Act, ("APA"), (5 U.S.C. § 701 et seq.) final agency action which this Court has jurisdiction to review. ANA will also show that it has been irreparably injured by those rulings and that the magnitude and impact of that injury will increase if the hearings continue.

This memorandum and the Weil and Hafner affidavits are submitted in support of plaintiff's motion, which seeks the following temporary relief, pending the outcome of this action:

1. An order that pending the final order herein by this Court the Federal Trade Commission expunge from its rulemaking record in the food advertising TRR all materials entered thereon by its staff on or about April 28-30, 1976, or

*All references to "Item" are to those Items contained in the Appendix to the Complaint filed with this Court.

2. A stay of all further hearings by defendants in their proceeding for a trade regulation rule for food advertising until the within action has been finally determined.

I

JURISDICTION

The APA provides that "... final agency action for which there is no other adequate remedy in a court are subject to judicial review" (5 U.S.C. § 704), and that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." (5 U.S.C. § 702.) The PO's rulings constitute final agency action for they included refusals to certify his decisions to the commission itself (Item 9), without which certification the commission will not, under its rules, entertain any appeal from them [16 CFR § 1.13(c)(2)(i)].

ANA is aggrieved by the PO's rulings (Weil affidavit, ¶¶ 5, 6; Hafner affidavit, ¶ 19) and without other administration or judicial remedy (Item 9). Thus, by virtue of the above sections of the APA alone, this Court is possessed of jurisdiction to grant the preliminary and final relief requested.

In addition, ANA retains, and is not foreclosed by 15 U.S.C. § 57a(e)(5)(A) from, a cause of action before this Court for review of preliminary rulings in the TRR proceeding

for which no other adequate remedy is available in a court.
15 U.S.C. § 57a(e) (5) (A) makes review by a court of appeals
exclusive only as to a final TRR. Subsection 57a(e) (B),
however, provides specifically that subsection (e) (5) (A)
review of a final TRR is additional to and not a displacement
of any other legal rights and remedies.

ANA respectfully submits that within the principles
enumerated in Dunlop v. Bachowski, 421 U.S. 560, 95 S. Ct.
1851 (1975) and Abbott Laboratories v. Gardner, 387 U.S.
136, 87 S. Ct. 1507 (1967), its case is ripe for judicial
review in this Court under the APA, hence under 15 U.S.C.
§ 57a(e) (5) (B).

In Dunlop the Supreme Court, citing Abbott, reiterated
that agency action is reviewable unless the agency could
"bear ... the heavy burden of overcoming the strong
presumption that Congress did not mean to prohibit all
judicial review of [its] decision". 421 U.S. at 567, 95 S.
Ct. at 1857. And, as was recently pointed out with respect
to Dunlop:

There is now virtually a presumption in favor
of review, which makes review the rule and
nonreviewability an exception which must be
demonstrated.

Schwartz, Administrative Law Cases During
1975, 28 Ad. Law Rev. 131,143 (Spring 1976).

II

THE WITHIN ACTION PRESENTS MATTERS OF GREAT IMPORTANCE TO ANA AND OTHER INTERESTED PARTICIPANTS IN THE TRR PROCEEDING

Any final rule regarding food advertising that may be promulgated by the commission will have monumental public impact. Sales of food products amount to more than \$180 billion per year; the advertising of those products accounts for expenditures of more than \$2 billion per year (TRR Hearing transcript, Public Record No. 215-40, testimony of Dr. Briggs at p.38). Based on the magnitude of the interests which will be affected by the rule, ANA's interests and those of its members are substantial and must be scrupulously protected.

But it is not ANA's interests alone which militate in favor of this Court's acting to curb the FTC abuses discussed in Appendix Items 4 and 8 and in the Weil and Hafner affidavits. Also, and perhaps most importantly involved in this proceeding is the precedential effect for future TRR proceedings of the modus operandi employed by the FTC which is now in issue. If FTC is allowed indiscriminately to dump into a rulemaking record, at virtually the eve of hearings, massive amounts of irrelevant material such as are presented here, it can lead to a serious, and perhaps fatal, erosion of interested persons' rights and abilities to participate in a truly meaningful way in any TRR proceeding (Hafner affidavit, ¶¶25, 26). It is this precedent that the Court is asked to nip in the bud, and thus protect not only ANA's rights here, but those of all who would participate in, and be affected by

future TRR proceedings.

III

ANA HAS BEEN IRREPARABLY INJURED

As is fully and more particularly set forth in the Weil and Hafner affidavits, and in the Appendix to the Complaint filed with this Court, ANA has continually pressed and petitioned the PO for segregation in and/or expunction from the public record of all materials irrelevant to phase one of the TRR proceeding (Appendix Items 4 and 8). Those petitions have uniformly been denied, with the sole exception to the extent of a rescheduling of the Washington hearing to November 12, 1976 (Appendix Items 4a and 9). In his denial of ANA's last petition (Appendix Item 8) the PO also refused to certify the issues presented by it to the full commission. Those same issues, rejected by the PO and foreclosed from further administrative review, are presented to this Court (Appendix Item 9).

The rulemaking record consists of approximately 45,000 pages, about 25,000 of which were submitted by FTC staff on April 28-30, 1976, the deadline for record submissions (Hafner affidavit, ¶¶ 12, 14; Items 5 and 8).

ANA cannot possibly review the entire 45,000 pages, glean from it only those issues pertinent to phase one, and at the same time prepare for, and participate in, the hearings as scheduled in the time allowed to it to do so (Appendix Items 5, 8; Weil affidavit, ¶ 4; Hafner affidavit,

¶12, 14, 17). To compel ANA to undertake such a review and to waste its resources of time and money in that exercise in order to attempt to preserve and utilize its statutory right of participation in the rulemaking proceeding would impose upon it a hardship and an impediment that violates any concept of fundamental fairness and due process.

The net effect, then, of the PO's rulings in allowing extensive irrelevant material to be entered onto the rulemaking record is to deny ANA, its members, and those interests it represents in the trade regulation rulemaking proceeding,* an adequate opportunity to present their case, to effectively marshal rebuttal evidence and to question and cross-examine those witnesses who appear during phase one of the trade regulation rule proceeding.

This motion is presented as a plea for preliminary relief since time is of the essence. ANA's injury, and its peril, increase if the hearings on the proposed TRR are allowed to proceed in their present condition; at each hearing, and indeed for each day and witness, ANA is confronted with additional material presented by an advocate of a particular point of view without having had the opportunity to properly study the witness's submission, similar submissions, or those isolated parts of the record which may be specifically relevant to a given witness's testimony or a particular part of the hearing.

*ANA has been designated a group representative by the PO pursuant to 15 U.S.C. §57a(c) (3) (A).

If the TRR hearings go forward as currently scheduled, ANA will either be forced to proceed without proper preparation in order to preserve its position in the within case, or to make its best effort at going through the bloated rulemaking record as it now stands, irrelevancies and all, thus rendering moot its cause here, and irretrievably losing its rights.

ANA's only adequate protection is by way of an order of this Court which temporarily expunges from the public record, pending a final decision in this action, all the material submitted by FTC staff on or about April 28-30, 1976, or by an order which imposes a stay on the TRR administrative proceedings pending a final decision in this action. (Compl. pp. 7-8, Weil affidavit, ¶¶6 and 7.)

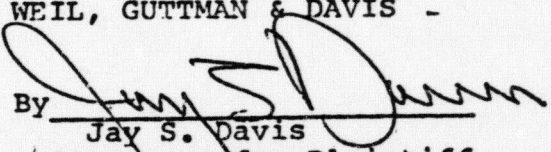
Wherefore ANA respectfully moves that this Court enter an order:

1. That the Federal Trade Commission expunge from its rulemaking record in the food advertising TRR all materials entered thereon by its staff on or about April 28-30, 1976 pending the final order herein by this Court, or

2. that stays all further hearings by defendants in their proceeding for a trade regulation rule for food advertising until the within action has been finally determined.

Dated: New York, New York
August 19, 1976

Respectfully submitted,
WEIL, GUTTMAN & DAVIS -

By 
Jay S. Davis
Attorneys for Plaintiff
Office and P. O. Address
60 East 42nd Street
New York, New York 10017
(212) 687-8573

Gilbert H. Weil
Bruce R. Hafner
Of Counsel

Defendants' Notice of Motion for an
order dismissing the complaint

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
ASSOCIATION OF NATIONAL :
ADVERTISERS, INC., :

Plaintiff, :

-v- :

FEDERAL TRADE COMMISSION, CALVIN :
J. COLLIER, Chairman, PAUL RAND :
DIXON and ELIZABETH HANFORD DOLE, :

Defendants. :
-----X

NOTICE OF MOTION

76 Civ. 3277 (JMC)

S I R :

PLEASE TAKE NOTICE that upon the Memorandum of Law submitted herewith, the defendant by its attorney Robert E. Fiske, Jr., United States Attorney for the Southern District of New York, will move this Court before the Honorable John M. Cannella, United States District Court Judge in Room 1001 of the United States Courthouse, Foley Square, New York, New York on September 10, 1976 at 9:30 A.M. for an order pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, dismissing the complaint, and for such further relief as is just and proper.

Dated: New York, New York

September , 1976.

ROBERT E. FISKE, JR.
United States Attorney for the
Southern District of New York
Attorney for Defendants

By: Gary G. Cooper

GARY G. COOPER
Assistant United States Attorney
Office and Post Office Address:
One St. Andrew's Plaza
New York, New York 10007
Telephone: (212) 791-1279

BEST COPY AVAILABLE

Defendants' memorandum of law in opposition
to plaintiff's motion for temporary relief
and in support of their motion to dismiss

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M-2037

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
ASSOCIATION OF NATIONAL
ADVERTISERS, INC.,

Plaintiff,

76 Civ. 3277 (JMC)

- v -

FEDERAL TRADE COMMISSION, CALVIN
J. COLLIER, Chairman, PAUL RAND
DIXON and ELIZABETH HANFORD DOLE,

Defendants.
-----x

DEFENDANTS' MEMORANDUM OF
LAW IN OPPOSITION TO PLAINTIFF'S
MOTION FOR TEMPORARY
RELIEF AND IN SUPPORT OF
THEIR MOTION TO DISMISS

Preliminary Statement

This memorandum is submitted by defendants in opposition to plaintiff's motion for temporary relief and in support of their motion to dismiss the complaint herein pursuant to Rule 12(b) Federal Rules of Civil Procedure. Plaintiff seeks to enjoin the Federal Trade Commission rule making proceeding (hereinafter the "proceeding") until determination of this action. Plaintiff also seeks a final order, directing the Federal Trade Commission (hereinafter referred to alternatively as the "FTC" or the "Commission") to expunge from the public record of the rulemaking proceeding "all matters" entered into the record by the staff of the FTC from April 18, 1976 to

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April 30, 1976, and, to limit the record to matters demonstrated to be relevant to the issues designated for hearing pursuant to the applicable rules and/or regulations of the FTC.

As will be demonstrated below, the complaint fails to state a cause of action upon which this Court may grant relief. Moreover, it is respectfully submitted that this Court lacks jurisdiction to either enjoin an administrative proceeding at an intermediate stage or to issue an order essentially establishing procedural guidelines governing the conduct of an administrative rulemaking proceeding.

FACTS

On or about May 28, 1975 the FTC commenced a rulemaking proceeding pursuant to 15 U.S.C. §§57a(a)(1)(B) and 57a(b)-(d)* to promulgate a Trade Regulation Rule intended to govern certain aspects of food products advertising.

On or about March 5, 1976 plaintiff filed a "notification of interest" in the proceeding, pursuant to 16 CFR §1.13(d). [Appendix to Complaint - Item 3a].

* Copies of the relevant statutory provisions are contained in the Appendix which plaintiff submitted with its complaint.

Plaintiff filed written comments, together with its notification, proposing issues for consideration as authorized by 16 CFR §1.13(b) [Appendix to Complaint - Item 3b]. Thereafter, the Presiding Officer for the proceeding notified plaintiff that they would be designated a member of the group of representatives participating in the proceeding, pursuant to 16 CFR §1.13(c)(1)(v) (Complaint, p. 3).

On or about March 2, 1976, the Presiding Officer issued a "Final Notice Regarding Proposed Trade Regulation Rule, (hereinafter the "Notice") (41 Fed. Reg. 8980, et seq.), pursuant to 16 CFR §§1.12 and 1.13(c)(1)(i) (Complaint, p. 3).

From commencement of the proceeding to issuance of the Notice a substantial volume of documents were introduced into the public record of the proceeding (Complaint, p. 4). Concededly, some of these documents do not relate to sections of the proposed rule which are to be the subject of the "first phase" of the proceeding (Complaint, p. 4).

On or about April 12, 1976 plaintiff filed a petition with the presiding officer to segregate those portions of the record deemed to be relevant to the proceeding from the remainder of the record, which plaintiff alleges

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is not relevant (Appendix to Complaint - Item 4). The petition was denied on April 22, 1976 (Appendix to Complaint - Item 4A).

From April 28, 1976 to April 30, 1976 staff of the FTC place a substantial number of documents into the record of the proceeding. Plaintiff alleges that the vast amount of these documents are not relevant to the first phase of the proceeding. Moreover, plaintiff alleges that in some instances the documents are not relevant to any portion of the proceeding (Complaint, p. 5).

On or about June 11, 1976 plaintiff filed a petition with the FTC requesting a six-month postponement of the commencement of the first hearing with respect to phase one of the proceeding from the scheduled date of July 12, 1976 (Complaint, p. 5). The request was denied on June 16, 1976 (Complaint, p. 5).

Copies of the documents which were introduced into the record between April 28, 1976 and April 30, 1976 were made available to plaintiff on June 16, 1976 (Complaint, p. 5).

On or about June 25, 1976 plaintiff filed a further petition with the FTC requesting the same relief which it requests in this action. In addition, plaintiff requested that an adverse ruling be certified for immediate review by the full Commission and that further hearings be postponed until final determination by the Commission. On or about

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July 1, 1976 this petition was also denied.

Plaintiff alleges that it will not have adequate time to review approximately 25,000 pages of documents which are alleged to be part of the record (Hafner Affidavit, ¶20). Plaintiff further alleges that the FTC has contrary to statutory prescription provided for discussion of the advisability of a rule in its proceeding (Hafner Affidavit, ¶¶20-22). Plaintiff also alleges that the existence of so substantial an amount of material in the public record will adversely effect its right to rebuttal and cross examination (Hafner affidavit, ¶20). Finally, plaintiff alleges that all rulings by the presiding officer in the proceeding are final insofar as they are not reviewable until the commission reviews the entire proceeding (Hafner Aff. ¶19). Consequently, it is plaintiff's contention that the inability to review the Commission decision prior to the end of the proceeding will result in irreparable harm (Hafner Aff. ¶19).

ARGUMENT

POINT I

THIS COURT DOES NOT HAVE
JURISDICTION OVER THE
SUBJECT MATTER OF THE
COMPLAINT.

A Magnuson Moss Act rule-making proceeding is not subject to judicial review, except in a United States Circuit Court of Appeals. 15 U.S.C. §57a(e)(1)(A). Moreover,

except in extraordinary circumstances, administrative intermediate rulings are not reviewable while the proceedings are being conducted. The subject proceeding has barely begun, therefore, even if plaintiff had selected the proper forum, which it has not, it would be unable to maintain this action without a showing of irreparable harm, which they have not made.

a) Court of Appeals has Exclusive Jurisdiction
To Review Rule-Making Proceeding.

Plaintiff requests this Court to direct the FTC to expunge certain portions of the record and to direct that "matters" shown to be relevant to the issues under consideration be entered into the record. This Court would be required to review the entire record before the Commission in order to diligently comply with plaintiff's request; an ambitious task at best and a task which both Congress and the courts have specifically guarded against. The singular provision for judicial review under the Magnuson Moss Act (hereinafter the "Act") is embodied in 15 U.S.C. §57a(e)(1)(A):

"Not later than 60 days after a rule is promulgated under subsection (a) (1)(B) of this section by the Commission, any interested person (including a consumer or consumer organization) may file a petition in the United States Court of Appeals for the

District of Columbia circuit or for the circuit in which such person resides or has his principal place of business, for judicial review of such rule. . ."

The Act specifically provides that the United States Court of Appeals shall have "exclusive" jurisdiction over such actions.

"The United States Court of Appeals shall have exclusive jurisdiction of any action to obtain judicial review (other than in an enforcement proceeding) of a rule prescribed under subsection (a)(1)(B) of this section, if any district court of the United States would have had jurisdiction of such action but for this subparagraph. Any such action shall be brought in the United States Court of Appeals for the District of Columbia circuit, or for any circuit which includes a judicial district in which the action could have been brought but for this subparagraph." 15 U.S.C. §57a(e)(5)(B) (emphasis added).

The foregoing provisions establish the sole procedure for invoking jurisdiction for judicial review under the Act. While the provisions are clear on their face as to when such review is appropriate, the Act's legislative history with respect to the above provisions, which is embodied in Senate Report No. 93-1408 makes it abundantly clear that Congress intended the Court of Appeals to be the exclusive forum for all pre-enforcement judicial review.

"The conference report provides for judicial review of final rules in appropriate U.S. Circuit Courts of Appeals. The venue for pre-enforcement review (whether under this subsection or under chapter 7 of Title 5 of the United States Code) is exclusively vested in such courts. If a petitioner desires such review in accordance with the review standards set forth in section 18(e)(3)(c), he must file a petition not later than sixty days after the rule is promulgated." 1974 U.S. Code Cong. & Administrative News, pp. 7755-7767, at p. 7766 (emphasis added).

Statutory provisions for an exclusive mode of review have long been recognized as carrying with them a concomitant proscription on alternative modes of review, even in circumstances where such review might otherwise be appropriate. In United States v. Babcock, 250 U.S. 328 (1919), the Court stated:

These general rules are well settled....
that where a statute creates a right
and provides a special remedy, that
remedy is exclusive.

See also Whitney National Bank v. Bank of New Orleans, 379 U.S. 411, 422 (1965); Macauley v. Waterman S.S. Corp., 327 U.S. 540, 543-545 (1946). See generally, "Jurisdiction to Review Federal Administrative Action: District Court or Court of Appeals", 88 HARV. L. REV. 980 (1975); 3 K. Davis, Administrative Law, §20.01 et seq. (1958 ed & 1970 supp.).

The Court of Appeals has been designated the appropriate forum for pre-enforcement review under the Act and plaintiff cannot circumvent that clear statutory prescription by a mere allegation that since the proceedings have not been completed they lack an adequate remedy. See, Bradley Lumber Co. v. National Labor Relations Board, 84 F.2d 97 (5th Cir. 1936). In this connection, plaintiff suggests that the ordinary method of review will not be adequate to protect its interest; however, "[i]t is well settled that the right of review afforded by the Circuit Court of Appeals constitutes a 'plain, speedy and adequate remedy and is a bar to the remedy by injunction'. Federal Trade Commission v. Claire Furnace, Co., 274 U.S. 160 (1927). Although F.T.C. v. Claire Furnace, Co., supra was an adjudicative proceeding, the purpose of the proceeding is not dispositive. Rule making proceedings are governed by the same considerations with respect to a statutory provision for exclusive review as are adjudicative proceedings. See Toilet Goods Association v. Gardner, 387 U.S. 158 (1967).

Thus where, as in the present case, Congress has provided adequate procedures for judicial review of administrative action, those procedures should be followed and only in extraordinary circumstances, which plaintiffs have not shown, will deviation be justified. Borden v. F.T.C., 495 F.2d 785 (7th Cir. 1974); Frito-Lay, Inc. v. F.T.C., 380 F.2d 8 (5th Cir. 1967).

- b) In The Absence Of A Clear Showing Of Irreparable Harm, This Court Lacks Jurisdiction To Intervene In An On-Going Administrative Proceeding

Apart from the fact that the Courts of Appeals alone are vested with exclusive jurisdiction to review an FTC rule-making proceeding, it is well settled that a federal district court will not intervene in a pending administrative proceeding, except in extraordinary circumstances. Renegotiation Board v. Bannerkraft, 415 U.S. 1 (1974); Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938); Seven-Up Co. v. F.T.C., 478 F.2d 755 (8th Cir. 1973). Sears, Roebuck & Co. v. N.L.R.B., 473 F.2d 91, (D.C. Cir. 1973); Coca-Cola Company v. F.T.C., 475 F.2d 299 (5th Cir. 1973); Bristol-Myers Company v. F.T.C., 469 F.2d 1116 (2d Cir. 1972). This principal is applicable to all Federal Trade Commission proceedings. Borden Inc. v. F.T.C., 495 F.2d 785, supra; Maremont Corp. v. F.T.C., 431 F.2d 124, 127-128 (7th Cir. 1970); and American Insurance Co. v. F.T.C., 496 F.2d 197, 200-201 (5th Cir. 1974).

An indispensable condition precedent to judicial intervention in a pending agency proceeding is a clear showing of irreparable harm. Renegotiation Board v. Bannerkraft, supra; Sears, Roebuck & Co. v. N.L.R.B., supra; Bristol-Myers Company v. F.T.C., supra. As the Supreme Court stated in Bannerkraft, supra:

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"Without a clear showing of irreparable harm, see Virginia Petroleum Jobbers Ass'n. v. FPC, 104 U.S. App. D.C. 106, III, 259 F.2d 921, 926 (1958), failure to exhaust administrative remedies serves as a bar to judicial intervention into the agency process. 415 U.S. 1, at p. 3

Plaintiffs have not shown injury sufficient to justify judicial intervention in an ongoing agency proceeding. In the few enumerated instances where courts have found it necessary to intervene in an ongoing administrative proceeding the injuries which were threatened were substantial enough to invite restraint. These included, an agency acting in excess of delegated powers or contrary to specific statutory mandate, Leedom v. Kyne, 358 U.S. 184 (1958);* proceedings involving questions of high national interest because of their international complexion, McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (1963); an agency's violation of a party's constitutional rights, Fay v. Douds, 172 F.2d 720 (2d Cir. 1949).

* While plaintiff implies throughout the affidavits in support of its motion that the Commission's statement of the basis and purpose of the proposed Rule is not consistent with statutory provisions (Hafner Affidavit, ¶¶ 20-22). 57 U.S.C. §57a(e)(5)(c) specifically states, inter alia:

"The contents and adequacy of any statement required by subsections (b)(4) of this section shall not be subject to judicial review. [Plaintiff challenges the (b)(4) statement].

In this case, plaintiff's principal objection to the proceeding involves submission of documents. Essentially, plaintiff challenges the Commission's practice of permitting the public to include an unlimited quantity of documents in the record. Plaintiff finds this practice particularly annoying because some of these documents do not appear to have any relationship to the issues involved in the proceeding. The Act provides for unlimited submission of documents. 15 U.S.C. §57a(b)(2) provides:

When prescribing a rule under subsection (a)(1)(B) of this section, the Commission shall...allow interested persons to submit written data, views, and arguments and make all submissions publicly available.

The Commission is empowered to "allow submission of written data, views and arguments". The statute does not limit the volume or content of the material which is to be accepted. Naturally, the Commission has the discretion to determine whether a submission is at all relevant to the proposed rule. However, there is no statutory proscription on the Commission's discretion in this area. Plaintiff is apparently attempting to persuade this Court that the equities in this case weigh in favor of judicial intervention. This argument has no place in an appeal for judicial intervention in an administrative proceeding. In Coca-Cola v. F.T.C., 475 F.2d 299 (5th Cir. 1973), the Court stated:

"The extraordinary remedy of judicial intervention in agency proceedings still in progress is unavailable unless necessary to vindicate an unambiguous statutory or constitutional right, and only when this condition is satisfied will a court look to the general body of equitable jurisprudence and other appropriate sources for the purpose of fashioning relief. To adopt the plaintiffs' position, on the other hand, would be to make the rule that judicial intervention to "correct" an interlocutory agency ruling is available wherever an agency ruling differed from some equitable maxim." Id. at p. 304.

The thrust of plaintiff's complaint and its request for relief is aimed at lessening the financial burden inherent in preparing for a proceeding in which a substantial record has been developed (Hafner Affidavit, ¶¶ 22-26). Plaintiff's claim that it does not have adequate time to review the material is without merit. The potential financial burdens of participation in an administrative proceeding is no basis for judicial intervention. It is firmly established that the mere expense and inconvenience of a prospective administrative hearing does not, without more, constitute irreparable injury. Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 41-52 (1938); Niagra Mohawk Power Corp. v. FPC, (2nd Cir., July 19, 1976), Dkt. No. 75-4263, (a copy of the opinion is attached). Plaintiff admits that a substantial portion of the record has no relevance to

the first phase of the proceeding. Consequently, a substantial portion of the record need not be thoroughly reviewed. If the amount of irrelevant material is nearly as great as plaintiff suggests, the task of review and preparation for hearing should be reduced substantially. Moreover, if a substantial portion of the subject material relates to other phases of the proceeding plaintiff need only segregate this material for use when occasion arises. Concededly, this alternative to judicial intervention may require expense and manpower; however, essentially plaintiff is suggesting that the Commission perform a similar function prior to plaintiff's review of the record.

c) The Administrative Procedure Act Does Not Apply

Plaintiff's contention that intervention is authorized under 5 U.S.C. §704 is misplaced. This argument is in conflict with the statutory language and the substantial body of authority interpreting the provision. Section 704 provides:

"Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court, are subject to judicial review. A preliminary, procedural, intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action."

It is clear that review under this provision is predicated upon (1) final agency action, i.e., not preliminary, procedural or intermediate; and (2) the absence of other adequate judicial remedies. In the present case the rulings complained of by plaintiff are purely procedural in nature, reviewable at the conclusion of the proceedings. Seven-Up Company v. F.T.C., 478 F.2d 755, 757 (8th Cir. 1973); Holland Furnace Company v. Purcell, 125 F.Supp. 74, 82-85 (W.D. Mich. 1954).

d) Courts Should Not Review
Procedural Rulings

The most important considerations in determining whether a statute contains adequate provision for review is that the procedures before the agency are appropriate and that the review afforded by the Court of Appeals is sufficient to protect against possible illegal action on the part of the agency. Such protections are embodied in the Act and plaintiff cannot argue that it will suffer irreparable injury if the proceeding continues. Plaintiff merely wants this Court to substitute its judgment for that of the presiding officer in the "housekeeping" aspects of the proceeding. Courts have traditionally frowned upon

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such requests. The proceeding should not be interrupted by a challenge of the kind being made by plaintiff. The Court should not attempt to substitute its judgment for that of the presiding officer. The proceeding should be completed and if plaintiff, at the conclusion of the proceeding, continues to believe that his rights to cross-examination or rebuttal have in some way been abridged by the Commission's procedures it will have a right to raise this objection in the Court of Appeals. Surely, that was Congress' intent and it is respectfully submitted that this Court should abide by that intent. The Supreme Court expressed similar views in the analogous case of Aircraft & Diesel Equipment Corp. v. Hirsch, 331 U.S. 752 (1947):

"The doctrine, wherever applicable, does not require merely the initiation of prescribed administrative procedures. It is one of exhausting them, that is, of pursuing them to their appropriate conclusion and, correlatively, of awaiting their final outcome before seeking judicial intervention.

"The very purpose of providing either an exclusive or an initial and preliminary administrative determination is to secure the administrative judgment either, in the one case, in substitution for judicial decision or, in the other, as foundation for or perchance to make unnecessary later judicial proceedings. Where Congress has clearly commanded that administrative judgment be taken initially or exclusively, the courts have no lawful function to anticipate the administrative decision with their own, whether or not when it has been rendered they may intervene either in presumed

accordance with Congress' will or because, for constitution reasons, its will to exclude them has been exerted in an invalid manner. To do this not only would contravene the will of Congress as a matter of restricting or deferring judicial action. It would nullify the congressional objects in providing the administrative determination." Id. at p. 767.

These principals are especially important with respect to a challenge of the kind being made by plaintiff. For this Court to substitute its judgment for that of the Commission on a purely procedural matter is not only perilous on its face but inconsistent with the fundamental immunity from interference in purely procedural matters which the judiciary holds so sacred. In Coca Cola Company v. FTC, supra, the Court stated:

'The plaintiffs are asking that a procedural, 'case-handling' decision be overturned in media res to require joinder "with the concomitant complication and clutter of the hearing." L. Jaffe, Judicial Control of Administrative Action 444 (1965). If trial courts are insulated from this kind of interference, see 28 U.S.C. § 1292(a), certainly administrative tribunals ought to be and, indeed, they generally have been, immune from interlocutory review of procedural rulings. E.g., Texaco, Inc. v. Federal Power Commission, 117 U.S.App.D.C. 268, 329 F.2d 223 (1963), cert. denied, 375 U.S. 941, 84 S.Ct. 346, 11 L.Ed.

2d 272 (1964); Chicago Automobile Trade Association v. Madden, 328 F.2d 766, 769 (7th Cir.), cert. denied, 377 U.S. 979, 84 S.Ct. 1885, 12 L.Ed.2d 747 (1964). If plaintiffs eventually prevail on review of the final order and it is necessary to begin anew with Commission proceedings, it will not be the first time events have taken that course. See Riss & Co. v. United States, 341 U.S. 907, 71 S.Ct. 620, 95 L.Ed.1345 (1951). For the time being, plaintiffs "must, as all others similarly situated must, wait with such fortitude and patience as . . . [they] can muster". Volney Felt Mills, Inc. v. Le Bus., 196 F.2d 497, 498 (5th Cir. 1952)." Id. pp. 304-305

In substance plaintiff's demands for relief are aimed at modifying the Commission's procedural guidelines. There is no material difference between the relief requested in the present case and the relief requested in Coca Cola, supra. Hence, the result in this case should be no different than the results in Coca Cola, supra.

II

INJUNCTIVE RELIEF IS NOT APPROPRIATE IN THE PRESENT CASE

Plaintiff has requested an injunction to stay the proceedings until this action has been determined. The fundamental and traditional requirement of all preliminary injunctive relief is a showing of irreparable harm and a likelihood of success on the merits. Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975). Plaintiff has clearly failed to satisfy this requirement. Furthermore, it is axiomatic

that district courts will not enjoin an administrative proceeding where provision is made for review by the Circuit Court of Appeals. FTC v. ~~Cle~~re Furnace Co., 274 U.S. 160 (1927); Coffin Bros. v. Bennett, 277 U.S. 29 (1928); Royal Baking Powder Co. v. FTC, 32 F.2d 966 (D.C. Cir. 1929). In Aron v. FTC, 50 F.Supp. 289 (E.D. Pa. 1943) the court succinctly stated this well established principal:

"Apart from the fact that the Circuit Courts alone are vested with exclusive jurisdiction to review orders of the Federal Trade Commission, it is well settled that the conduct of a statutory proceeding by an administrative agency of the government, where judicial review is provided for by the enabling statute, may not be enjoined by either a District Court or a Circuit Court of Appeals."
Id. p. 290.

III

CASES CITED BY PLAINTIFF ARE NOT APPLICABLE TO THE PRESENT FACTS

The cases cited by plaintiff in support of its motion are distinguishable from the case at bar. In Dunlop v. Bachowski, 421 U.S. 560 (1975), the Court was called upon to decide the reasonableness of a decision by the Secretary of Labor, under 29 U.S.C. § 483, not to commence an action to set aside a union election. Unlike the case at bar where review is provided for by statute, the statute in question in Dunlop contained no provision for judicial review of the Secretary's decision. Moreover, it contained no provision prohibiting such review. The Secretary's

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action in Dunlop unquestionably constituted a final agency action affecting substantial constitutional rights of the petitioning party. Consequently, unlike the present case, Dunlop represents a classical case in which APA §704 should apply.

Abbott Laboratories v. Gardner, 387 U.S. 136 (1967), is also predicated upon a final agency determination. The case involved the Secretary of Health, Education and Welfare's issuance of regulations requiring certain labeling on drugs. As in Dunlop, supra, the regulations were final insofar as drug manufacturers were required to comply with them immediately. The present case does not involve an administrative determination even remotely comparable to the kind of determinations under attack in the Dunlop case and the Abbott case. Before the proposed rule in the present case can be enforced, the proceeding is subject to ample judicial review. Plaintiff's reference to these cases is, therefore, clearly inappropriate.

CONCLUSION

In accord with the above, plaintiff's motion for temporary relief should be denied and defendant's motion to dismiss the complaint should be in all respects granted.

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Respectfully submitted,

ROBERT S. FISKE, JR.
United States Attorney for the
Southern District of New York
Attorney for Defendants

GARY G. COOPER
Assistant United States Attorney

- Of Counsel -

Stipulation and Order rescheduling defendants'
motion pursuant to rule 12(b) for 9-20-76

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- -x
ASSOCIATION OF NATIONAL
ADVERTISERS, INC.,

Plaintiff,

76 Civ. 3277 (JMC)

STIPULATION

- v -

FEDERAL TRADE COMMISSION, CALVIN
J. COLLIER, Chairman, PAUL RAND
DIXON and ELIZABETH HANFORD DOLE,
Commissioners,

Defendants.
----- -x

IT IS HEREBY STIPULATED by and between counsel for the
respective parties that defendants' motion pursuant to Rule 12(b),
set for September 10, 1976, has been rescheduled for September 20,
1976.

Dated: September 8, 1976

WEIL, GUTTMAN & DAVIS

By Robert L. Sherman

Robert L. Sherman
Attorneys for Plaintiff

Dated: September 8th, 1976

ROBERT B. FISKE, JR.
U.S. Attorney for the Southern
District of New York

By Gary G. Cooper

Gary G. Cooper
Attorney for Defendants

Dated: New York, New York

So ordered

BEST COPY AVAILABLE

U.S.D.J.

-160a-

Stipulation and Order extending time to file
plaintiff's memorandum in opposition to defendants'
motion to dismiss and rescheduling return dates of motions

Plaintiff's memorandum in opposition to
defendants' motion to dismiss

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ASSOCIATION OF NATIONAL
ADVERTISERS, INC.,

Plaintiff,

-against-

76 CIV 3277 (JMC)

STIPULATION

FEDERAL TRADE COMMISSION, CALVIN
J. COLLIER, Chairman, PAUL RAND
DIXON and ELIZABETH HANFORD DOLE,
Commissioners,

Defendants.

----- -x

IT IS HEREBY STIPULATED AND AGREED by and between
counsel for the respective parties that the time within which
plaintiff may file its Memorandum in Opposition to Defendants'
Motion to Dismiss be extended to and including September 22,
1976 and that defendants' Motion to Dismiss together with plain-
tiff's previously filed Motion for Preliminary Relief are re-
turnable on September 29, 1976.

IT IS FURTHER STIPULATED AND AGREED that plaintiff will
seek no further extension of time to file its Memorandum in
Opposition to Defendants' Motion to Dismiss.

Dated: September 15, 1976

WEIL, GUTTMAN & DAVIS

By B. Hafner
Bruce R. Hafner
Attorneys for Plaintiff

Dated: September 15, 1976

ROBERT B. FISKE, JR.
U.S. Attorney for the
Southern District of
New York

By Gary G. Cooper
Gary G. Cooper
Attorney for Defendants

SO ORDERED:

U.S.D.J.

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-161a-

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - x

ASSOCIATION OF NATIONAL
ADVERTISERS, INC.,

Plaintiff,

76 CIV 3277 (JMC)

-against-

FEDERAL TRADE COMMISSION, CALVIN
J. COLLIER, Chairman, PAUL RAND
DIXON and ELIZABETH HANFORD DOLE,
Commissioners,

Defendants.

- - - - - x

MEMORANDUM IN OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS

Precis

The essential facts are presented in the affidavits of Bruce R. Hafner, sworn to July 21, 1976 (Hafner) and Gilbert H. Weil, sworn to August 12, 1976 (Weil). The crux of plaintiff's case concerns obstruction of its ability to pursue its rights of meaningful cross-examination and rebuttal during a rulemaking proceeding to promulgate a trade regulation rule (TRR) for the advertising of food products. Plaintiff maintains that:

a) it has a statutory right to participate in the aforementioned rulemaking proceeding by conducting meaningful cross-examination and presenting meaningful rebuttal submissions;

b) defendants, by flooding the rulemaking record with thousands of irrelevant documents, many of them concededly so, at the latest possible moment, would deprive plaintiff of its ability adequately to prepare for meaningful cross-examination and rebuttal, and thus would deprive it of its aforementioned statutory rights and of constitutional due process;

c) in order to protect plaintiff's rights fully, defendants should be ordered to segregate and expunge from the record the documents so indiscriminately dumped into it, and only after the relevancy of such documents has been demonstrated to the Federal Trade Commission (Commission) should they be allowed back into the record.

Defendants' motion is to dismiss the complaint for lack of subject-matter jurisdiction and for failing to state a cause of action. Of course, such a motion admits for its purposes all matters well pleaded in the complaint.

Defendants themselves do not deny that plaintiff has rights of meaningful cross-examination and rebuttal but do deny having interfered with those rights. They also concede that under appropriate circumstances a federal district court may exercise review over agency action (Def. Mem., pp. 6, 9, 10, 11) but deny that such circumstances exist here. Additionally, defendants claim that exclusive jurisdiction lies in the courts of appeals and that plaintiff must await the promulgation of a final trade regulation rule before seeking judicial relief; that plaintiff has not made a

showing of irreparable harm; that the Administrative Procedure Act does not apply; and that injunctive relief should not be granted.

Plaintiff will refute these contentions and show:

1) that its basic rights to cross-examination and rebuttal are clearly established, apart from the due process clause of the constitution itself, by the Federal Trade Commission Act (15 U.S.C. § 57a(c); by the Commission's own Rules of Practice (15 U.S.C. foll. § 45, 16 CFR §1.13);

2) that defendants' actions would deprive plaintiff of such rights by arbitrarily and improperly imposing upon it an unfair and unreasonable burden to prepare for cross-examination and rebuttal, in a manner which, if precedentially allowed in this case can, by the same principle, be utilized by the Commission in any trade regulation rulemaking proceeding to thwart the cross-examination and rebuttal rights congress intended that interested persons shall have;

3) that plaintiff has exhausted its administrative remedies;

4) that deferred judicial review cannot provide plaintiff with an adequate

remedy and neither 5 U.S.C. § 704, 15 U.S.C. § 57a(c), nor judicial precedent bars plaintiff from having review in this Court under the doctrines of Leedom v. Kyne, 358 U.S. 184 (1958), Abbott Laboratories v. Gardner, 387 U.S. 136 (1967), Gardner v. Toilet Goods Association, 387 U.S. 167 (1967), Fay v. Douds, 172 F.2d 720 (2nd Cir. 1949), and The Coca-Cola Company v. FTC, 475 F.2d 299 (5th Cir. 1973), and

5) that plaintiff will be irreparably injured if the relief it seeks is not granted.

I

PLAINTIFF'S STATUTORY AND DUE PROCESS RIGHTS ARE IN JEOPARDY

The Federal Trade Commission Act recently has been amended to provide general procedures for promulgating trade regulation rules. They include the rights of cross-examination and rebuttal by interested persons, 15 U.S.C. § 57a(c)(1)(B); see also 16 CFR § 1.13 (d)(5)(i). A presiding officer, appointed by the Commission and charged with responsibility for the orderly conduct of the

the rulemaking proceeding, must see to it that such rights are protected.1/

It becomes evident from a mere reading of the provisions in the Commission's Rules detailing (1) under what conditions a request for cross-examination should be granted and (2) how selection of representatives for the purpose of cross-examination should be made, that the procedures alluded to above require the rights to cross-examination and rebuttal be fully and meaningfully honored. The presiding officer identifies groups of persons with the same or similar interests and may select their representative for the purpose of cross-examination, 15 U.S.C. § 57a(c)(3)(A); 16 CFR §1.13(c)(1)(v). Plaintiff has been designated such a representative by the presiding officer (Hafner,

-
1. The presiding officer shall conduct or allow to be conducted examination, including cross-examination of oral presentations and the presentation of rebuttal submissions relevant to the issues designated for consideration ... (16 CFR §1.13(d)(5)(i)) (emphasis added).

It would seem that if cross-examination and rebuttal must be limited to what is relevant, so, too, must be the evidence (including written submissions) to which those processes are to be applied.

¶8; Complaint, ¶Sixth). It has been entrusted on behalf of corporations representing annually many millions of dollars for the advertising of food products to cross-examine and rebut during the administrative proceeding in a manner that will represent and protect their interests in the outcome. The Act and the Rules provide the means to accomplish that objective. Due process requires that a real opportunity be available for it to happen.

It is noteworthy that the right to cross-examination is considered so fundamental that the inability of a group to agree upon its representative will not deprive a person of the opportunity to conduct his own cross-examination where his particular interest is involved.^{2/}

Readily apparent from the emphasis given to it by the Act and the Commission's own Rules is that the right to cross-examination is basic to a meaningful rulemaking proceeding. More than that, it is clear from the detailed

2.

.. such person shall not be denied ... the opportunity to conduct (or have conducted) cross-examination as to issues affecting his particular interests if ... he has made a reasonable and good faith effort to reach agreement upon group representation with other members of the group ... and ... there are substantial and relevant issues which are not adequately presented by the group representative, 15 U.S.C. § 57a(c) (3)(B). See also, 16 CFR §1.13(d)(5)(iii).

provisions within the Rules, including a mandate to the presiding officer to see to it that such cross-examination be conducted, that cross-examination and rebuttal are fundamental rights, and are to be enjoyed directly or through a representative by every interested person who participates in the rulemaking proceeding. Without it a rulemaking proceeding would be little more than a charade; the public record little more than fantasy.

Thus, the right to cross-examination is guaranteed by more than the statutory provision cited above. It is a vital area within the constitutional guarantee of due process. And for it to be protected it must be made available in a meaningful way, for anything short of meaningfulness is tantamount to deprivation.

II

DEFENDANTS EFFECTIVELY WOULD DENY PLAINTIFF ITS RIGHTS TO CROSS-EXAMINATION AND REBUTTAL

The rulemaking record consists of approximately 45,000 pages, about 25,000 of which were submitted by FTC staff on April 28-30, 1976, the deadline for record submissions (Hafner affidavit, ¶¶ 12, 14; items 3/ 5 and 8; Complaint, ¶Ninth). A fair sampling of those pages

3. Reference to "item" is to those items contained in the Appendix to the Complaint with this Court.

shows that an inordinate proportion of them bears no relevancy to the issues now involved in the TRR proceeding (Weitzman affidavit (Weitzman I), ¶¶8-10, item 5). If defendants had the power to bury needles of relevancy in haystacks of impertinence, as they would do here, they would be armed to emasculate the congressionally intended and constitutionally guaranteed rights of interested persons to cross-examination and rebuttal by effectively hiding the evidence that needs to be so treated in a mass of meaningless diversions; and by making an interested person's task of plucking the relevant evidence from its irrelevant concealments too burdensome and costly to be feasible. Such pragmatic frustration of cross-examination and rebuttal becomes all the more devastating (if over-kill can mean more than kill) by the scheduled time limits within which cross-examination and rebuttal must be done or forever foresaken (Weil affidavit, ¶4; Hafner affidavit ¶¶12, 14 and 17.)

To saddle plaintiff, and all other interested persons, with the burden of conducting such a review and analysis and to compel them to divert their finite resources of money and brain-hours to separating the relevant out of the irrelevant would erect an impediment to meaningful cross-examination and rebuttal that violates any concept of fundamental fairness and due process - and which in large part is due solely to the FTC staff's last-minute, promiscuous deluge.

To avoid any misunderstanding, let it be clear that plaintiff is not challenging the quantity of documents in the record. Plaintiff similarly is not challenging any member of the public's right to participate in the proceeding or to submit an unlimited number of relevant documents. What plaintiff is challenging is defendants' cluttering of the record with irrelevant documents - to a point which unduly prejudices plaintiff's, and the public's, right to meaningful participation in the rulemaking proceeding.

Apparently that does not concern the defendants. They admit that documents they have put in the record are not relevant to the designated issues,^{4/} Def. Mem., p. 3. They feel their actions are justified by the general statutory procedure which merely allows documentary submissions. The essence of their argument is that the statute allows a rulemaking record to be turned into a virtual garbage dump, notwithstanding the statutory requirement that any final rule be based on the rulemaking record as a whole (15 U.S.C. §57a(b)(4)) which should contain information considered relevant to such rule (15 U.S.C. ~~§ 57a(e)(1)(B))~~.^{5/}

4. The presiding officer has divided the proceeding into three separate phases, ruling that, for the present, hearings are to take place on only the first phase - with only that phase's specific issues to be considered therein, 41 Fed. Reg. 8980, et seq. (March 2, 1976); Complaint, ¶ Seventh.

5. The definition of "rulemaking record" includes written submissions and any other information considered relevant to the rule. A fortiori the submissions also must be relevant.

Under their theory, of course, nothing would prevent defendants from placing or permitting to be placed on the record a submission of the entire contents of the Library of Congress! And for all intents and purposes, they may as well have done just that. For there is little difference to plaintiff whether it has to review and analyze, in an insufficient time period no less, 25,000 largely irrelevant⁶/ pages or millions of such pages. In either case the time strictures within which it must work prevent adequate preparation for the upcoming hearings. Of course, had the documents complained of had demonstrated relevancy to the designated issues, and had they been submitted in an orderly fashion rather than unloaded at the eleventh hour, plaintiff would have no cause to complain. But where a paper mountain is created overnight which can serve no useful purpose but to thwart an interested person's genuine attempt at preparation for cross-examination and preparation for rebuttal, there is good cause for complaint. That is especially so where, as here, those documents were not even made available for an additional seven weeks, Complaint ¶Tenth.

6. See description of typical examples of such irrelevant documents in two pages of an affidavit (Weitzman II, attachment 4 to item 8), attached hereto as Exhibit 1 (the remainder of the affidavit similarly describes the irrelevancy of record documents) and note a description of the reasonable sampling methods by which examples such as these were discovered (Weitzman I, ¶¶8-10, item 5).

Collapsing the time to prepare adequately for meaningful cross-examination and rebuttal (Hafner, ¶¶ 14, 17) and then requiring the remaining time to be used for a wasteful exercise (Hafner, ¶¶ 13, 16), violates the mandate of the statute and deprives plaintiff of the due process congress intended to preserve for it.

III

THIS COURT HAS JURISDICTION AND SHOULD EXERCISE IMMEDIATE REVIEW

Plaintiff has availed itself of every conceivable opportunity before the presiding officer (who refused to certify plaintiff's petition to the Commission) in attempting to assure itself of meaningful participation in the rulemaking proceeding via meaningful cross-examination and presentation of rebuttal submissions. It cannot seriously be contended that all administrative remedies have not been exhausted (Hafner, ¶¶ 13, 17, 18; Items 4, 4a, 6, 7, 8, 9; Complaint, ¶¶ Eighth, Tenth, Eleventh, Twelfth, Thirteenth).

Every point referred to hereinabove was advanced in even greater elaboration and detail to the defendants via their designated exclusive delegate, the presiding officer (16 CFR §1.13(c)(1)). See Hafner, ¶¶ 13, 17, 18.

Unfortunately, plaintiff's attempts before the presiding officer have not succeeded in having the irrelevant documents segregated and filtered from the record. Adequate

preparation thus has been made prohibitive. (Supra, points I and II.)

The United States Supreme Court has held that in appropriate circumstances an injured party need not await final agency action before having judicial review, Leedom v. Kyne, 358 U.S. 184 (1958). Plaintiff finds itself in those circumstances.

Leedom established one's right to immediate judicial review and appropriate remedy upon a showing that unlawful action by an agency has inflicted an injury on it.

This case, in its posture before us, involves "unlawful action of the Board [which] has inflicted an injury on the [respondent]. Does the law, "apart from the review provisions of the ** Act," afford a remedy? We think the answer surely must be yes. This suit is not one to "review", in the sense of that term as used in the Act, a decision of the Board made within its jurisdiction. Rather it is one to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act. * * * It deprived the professional employees of a "right" assured to them by Congress. Surely, in these circumstances, a Federal District Court has jurisdiction of an original suit to prevent deprivation of a right so given.

Id. at 188-89.

"If the absence of jurisdiction of the federal courts meant a sacrifice or obliteration of a right which Congress had created, the inference would be strong that Congress intended the statutory provisions governing the general jurisdiction of those courts to control...." [citation omitted].

Id. at 190.

This Court cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers.

Id.

The acts complained of herein come within those which fashioned the Leedom v. Kyne doctrine. Plaintiff is not asking this Court to review a finally promulgated trade regulation rule (whether anticipatorily or after the administrative proceeding has concluded, and over which the courts of appeals unquestionably do have exclusive jurisdiction). It is asking for relief from final agency action taken in derogation of statutory authority and of the constitution, during the administrative proceeding to be sure, but for which subsequent review will be too late to provide an adequate remedy. Leedom establishes plaintiff's right to immediate enough judicial review to be timely and effective. Here, as there, plaintiff is seeking protection "of a 'right' assured to it by Congress" (see, 15 U.S.C. §57a(c); 16 CFR §1.13(d)(5)(i)) of which it would otherwise be deprived by agency action. Supra, points I and II.

Additionally, more than a quarter century ago this circuit held that district courts need not await final action before reviewing disputes engendered by the conduct of administrative proceedings where there is an "assertion of a constitutional right ... not transparently frivolous", Fay v. Douds, 172 F.2d 720 (2nd Cir. 1949). Other circuits have come into accord with that doctrine,

The Coca-Cola Company v. FTC, 475 F.2d 299, 303 (5th Cir. 1973); The Seven-Up Company v. FTC, 478 F.2d 755, 757 (7th Cir. 1973); Miami Newspaper Printing Pressman's Union Local v. McCulloch, 322 F.2d 993, 996 (D.C. Cir. 1963).

It is well accepted that the denial of the right to cross-examination constitutes a violation of the constitutional right of due process.

As has been demonstrated, supra point II, defendants' allowance of the public record to be cluttered with mountains of irrelevant documents, and with insufficient time to review and analyze them before scheduled hearings take place, would deny, if allowed to go unremedied, plaintiff its right to cross-examination and meaningful participation in the proceeding and, thus, of due process. This Court has jurisdiction to order an administrative agency to undertake the necessary preliminary steps to assure that such right will not be infringed, Fay v. Douds, supra at 723; Coca-Cola v. FTC, supra at 303. That is all this Court is being asked to do at this time. This Court is not being asked, as defendants would have it believe (Def. Mem., p. 6), to review the entire record currently before the Commission; FTC would do that. This Court is being asked to direct the Commission to expunge certain documents from the record, and only after a showing to the FTC of relevancy, to allow the presiding officer to re-enter them into the record.

In no event should this case be dismissed, however, for "there is [by] now virtually a presumption in favor of review, which makes review the rule and non-reviewability an exception which must be demonstrated", Schwartz, "Administrative Law Cases During 1975", 28 Admin. L. Rev. 131, 243 (Spring 1976).7/

The guiding principles concerning reviewability derive from the Supreme Court's 1967 Abbott Laboratories trilogy.8/ There the Supreme Court made it clear that requests for judicial relief shall be given "hospitable" treatment.

...the Administrative Procedure Act ... embodies the basic presumption of judicial review to one "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute," 5 U.S.C. § 702, so long as no statute precludes such relief or the action is not one committed by law to agency discretion, 5 U.S.C. § 701(a). The Administrative Procedure Act provides specifically not only for review of "[a]gency action made reviewable by statute" but also for review of "final agency action for which there is no other adequate remedy in a court," 5 U.S.C. § 704. The legislative material elucidating that seminal act manifests a

7. See Dunlop v. Bachowski, 421 U.S. 560 (1975) as an illustration of the strong policy of the law in favor of judicial review.

8. Abbott Laboratories v. Gardner, 387 U.S. 136; Toilet Goods Association v. Gardner, 387 U.S. 158; Gardner v. Toilet Goods Association, 387 U.S. 167.

congressional intention that it cover a broad spectrum of administrative actions, and this Court has echoed that theme by noting that the Administrative Procedure Act's "generous review provisions" must be given a "hospitable" interpretation. Shaughnessy v. Pedreiro, 349 U.S. 48, 51, 75 S. Ct. 591, 594, 99 L. Ed. 868; see United States v. Interstate Commerce Comm'n, 337 U.S. 426, 433-435, 69 S. Ct. 1410, 1414-1415, 93 L. Ed. 1451; Brownell v. We Shung, supra; Heikkila v. Balber, supra. Again in Rusk v. Cort, supra, 369 U.S. at 379-380, 82 S. Ct. at 794, the Court held that only upon a showing of "clear and convincing evidence" of a contrary legislative intent should the courts restrict access to judicial review. See also, Jaffe, Judicial Control of Administrative Action 336-359 (1965).

Abbott Laboratories v. Gardner, 387 U.S. 136, 140-41 (1967) (footnote omitted); to same effect, Gardner v. Toilet Goods Association, 387 U.S. 167 (1967). Cf., Toilet Goods Association v. Gardner, 387 U.S. 158 (1967).

As the Supreme Court stated in McKart v. United States, 395 U.S. 185, 193 (1967):

The doctrine [exhaustion of administrative remedy] is applied in a number of different situations and is, like most judicial doctrines, subject to numerous exceptions see e.g., Layton & Fine, The Draft and Exhaustion of Administrative Remedies, 56 Geo. L.J. 315, 322-331 (1967). Application of the doctrine to specific cases requires an

understanding of its purposes and of the particular administrative scheme involved.^{9/}

Cases involving the Commission specifically amply illustrate this, following the doctrine of such decisions as Leedom v. Kyne, 358 U.S. 184 (1958); Boire v. Greyhound Corp., 376 U.S. 473 (1963); Oestereich v. Selective Service System Local Board No. 16, 393 U.S. 460 (1970).

Thus in B.F. Goodrich Co. v. FTC, 208 F.2d 829 (D.C. Cir. 1953), appeal after remand 242 F.2d 31 (1957), the court reversed judgments of the district court dismissing, for lack of jurisdiction, actions to enjoin the Commission from enforcing a rule promulgated by it under the Robinson-Patman Act. The court of appeals stated:

Our problems are whether the District Court had jurisdiction and whether the complaints stated a claim upon which relief could be granted. Those problems boil down to whether the complaints allege the sort of damage which will support injunctive relief against an administrative regulatory order.

208 F.2d at 832 (footnote omitted).

9. McKart is itself an exception, holding that a Selective Service draftee's "failure to utilize a particular administrative process - an appeal - [does not ban] him from defending a criminal prosecution on grounds which could have been raised on that appeal." (395 U.S. at 197.)

and

We think the proper disposition of the cases under the circumstances is to remand them all with directions to the District Court to entertain them as an initial step, and if upon hearing it develops that some of the plaintiffs are not actually threatened with damage by way of disruption of business, those complaints can be dismissed.

208 F.2d at 834.

In a 1964 decision by this Court, Union Bag-Camp Paper Corporation v. FTC, 233 F. Supp. 660 (S.D.N.Y. 1964), Judge Cooper accepted jurisdiction to determine whether the plaintiff was entitled to have the Commission obtain, for plaintiff's benefit, certain special reports pursuant to FTCA §6(b), 15 U.S.C. § 46(b).^{10/}

Judge Cooper stated, "If we are satisfied that the Commission has violated a statutory mandate here, we will not require plaintiff to wait until it is ordered to cease and desist from violating Section 7 of the Clayton Act before obtaining redress." 233 F.Supp. at p. 663. He went on to

10. The court dismissed the complaint on its merits on the ground that plaintiff had no such statutory right where section 6(b) orders are concerned. Here, of course, plaintiff is relying upon the constitutional right of due process and statutorily based rights defined in 15 U.S.C. §57a(c), and recognized by defendants themselves in 16 CFR §1.13.

state, "Plaintiff is claiming that the agency action was in direct derogation of the alleged statutory command to supply it with 6(b) reports. Clearly, the instant action falls within the ambit of both Leedom and Boire as one involving the interpretation and construction of a statute." (At p. 663.)

In Elmo Division of Drive-X Co., Inc. v. Dixon, FTC, 348 F.2d 342 (D.C. Cir. 1965) the court reversed a district court holding that it lacked jurisdiction to stop the Commission from proceeding upon an administrative complaint where, according to plaintiffs, the existence of an earlier consent decree required the Commission to proceed, instead, by way of reopening the earlier case. Pertinently, the court wrote:

Were this an action between private parties, appellant would be hard pressed to demonstrate absence of an adequate remedy at law and this would ordinarily render specific relief inappropriate. Here, however, the injury which appellant asserts is one for which any adequate legal remedy is very remote.* * * The gist of appellant's complaint is ... that the Commission may not institute any complaint proceeding against it in relation to matters covered by the consent order until the necessary preliminary findings have been made at a reopening hearing reviewable by a Court of Appeals. Given the nature of the injury claimed, an appellate court reviewing an order

resulting from the new complaint proceeding can afford appellant no meaningful remedy.

348 F.2d at 347 (footnotes omitted).11/

The selective holdings of the Court of Appeals for the Seventh Circuit in Jewel Companies Inc. v. FTC, 432 F.2d 1155 (1970) are highly illuminating. It held that the court should not intervene before final agency decision to determine (1) whether the agency complaint was adequate as a matter of law, and (2) whether the discretion of the Commission was properly exercised in issuing its administrative complaint, and (3) whether the Commission's action would be an infringement on the jurisdiction of the Secretary of Agriculture under 7 U.S.C. §§ 499(a) et seq. By contrast however, the court did hold that jurisdiction existed to review immediately an asserted misunderstanding by one of the commissioners (whose vote was determinative to issuance of the Commission's complaint) as to the construction of the Commission's obligation of enforcement under sections 2(c) and 11 of the Clayton Act, 15 U.S.C. §§13(c) and 21. The court stated:

11. Here, similarly, a court of appeals reviewing a final TRR under 15 U.S.C. § 57a(e)(1)(A) can afford plaintiff no meaningful remedy (see pages 25-28, below).

The question raised is inherently a legal one and does not involve any factual determinations ... Since the question is one of statutory construction as to the authority of a Commissioner in voting for the issuance of a complaint for violation of Robinson-Patman and does not involve any substantive determination by the Commission, the Commission's reliance upon Myers v. Bethlehem Shipbuilding, supra, is misplaced. * * * The legal obligation of a Commissioner can be determined by the courts without delay and we think the proper approach is to allow such inherently legal attacks prior to an agency's final order.

432 F.2d at 1159
(footnote omitted).

Illustrations of interlocutory judicial intervention despite purportedly exclusive appellate procedures under the National Labor Relations Act are found in Farmer v. United Electrical, Radio Machine Workers of America (UE), 211 F.2d 36 (D.C. Cir. 1953) and Miami Newspaper Printing Pressman's Union Local v. McCulloch, 322 F.2d 903 (D.C. Cir. 1963).

The question pivotal here, then, as distilled from the pertinent authorities are:

1. Is plaintiff suffering legal wrong or being adversely affected or aggrieved by action of the defendants?
2. Is such action final?
3. Does any statute preclude this Court from giving plaintiff the relief it seeks?

4. Does plaintiff have other adequate remedy in a court for defendants' said action?

Plaintiff's aggrievedness, as a matter of law 12/ and constitutionality 13/, is firmly established by application of Leedom v. Kyne and Fay v. Douds (supra, pages 12-14) to the indisputable facts herein.

Similarly, there can be no doubt, upon the uncontroverted facts herein, that (a) the presiding officer's rejection of plaintiff's petition and his refusal to certify it to the full Commission was a denial of relief, hence, "agency action" within the definition of 5 U.S.C. §551(13), 14/ and (b) that it was final (Hafner, ¶10; Complaint ¶Thirteenth).

Neither 5 U.S.C. § 704 nor any other statute "precludes such relief" (Abbott, supra, p. 15-16) as the plaintiff seeks from this Court. Defendants rely upon the sentence in section 704 that reads, "a preliminary, procedural, or intermediate agency action or ruling

12. "... we believe the issues presented are appropriate for judicial resolution at this time. First, all parties agree that the issue tendered is a purely legal one: ..." Abbott Laboratories at 149.

13. "Where ... parties bring suit in District Court alleging the deprivation of specific constitutional rights ... the District Court has jurisdiction to inquire into the preliminary question of whether judicial vindication of the alleged rights is appropriate in a given procedural setting, and if so, whether such rights have been infringed and how they ought to be redressed." The Coca-Cola Company at 303.

14. "'agency action' includes the whole or a part of ... agency ... relief ... or denial thereof, or failure to act."

not directly reviewable is subject to review on the review of the final agency action." This provision does not, however, undertake to declare what preliminary, procedural or intermediate agency actions or rulings are or are not directly reviewable; and it certainly does not mandate that preliminary, procedural or intermediate agency actions or rulings as such shall not be directly reviewed.^{15/} Yet that is the construction that would be necessary to support the defendants' position.

Defendants also contend that the Magnuson/Moss Act provides for exclusive jurisdiction in the courts of appeals. To support their contentions defendants quote various provisions of that statute and of the legislative history accompanying its enactment. The citations relied on by defendants betray their position.

In each instance, the section relied on by defendants refers to review of a "rule" [15 U.S.C. §57a(e)(1)(A); 15 U.S.C. §57a(e)(5)(B)] or to "final rules" (1974 U.S. Code Cong. & Administrative News 7755, 7766). By

15. As Abbott pointed out, citing Rusk v. Cort, "Only upon a showing of the 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review" (supra, page 16).

Rather than being restrictive, section 704 is a safeguard against any prejudicial agency action escaping judicial review entirely.

its own terms the judicial review section of the Act, which does include the jurisdiction and venue provisions for courts of appeals, applies to finally promulgated trade regulation rules. That, with the exception of subsection (e)(5)(C),^{16/} it relates only to review of final rules is made clear if not emphasized, by 15 U.S.C. § 57a(e)(5)(A) which provides that "[r]emedies under the preceding paragraphs of this subsection are in addition to and not in lieu of any other remedies provided by law." See, for example, Leedom v. Kyne and Fay v. Douds, supra.

16. Section 57a(e)(5)(C), which does deal explicitly with cross-examination and rebuttal, imposes appellate exclusivity only where the allegedly improper curtailment arises out of a "determination, rule, or ruling of the Commission described in paragraph (3)(B)(i) or (ii)". Those paragraphs refer, in turn, only to Commission actions pursuant to "a Commission determination, ... or rule or ruling under subsection (c) of this section" either that "the petitioner is not entitled to conduct cross-examination or make rebuttal submissions" or "limiting the petitioner's cross-examination or rebuttal submissions" (emphasis ours).

Indeed, appellate jurisdiction over the matter involved in this case is not even conferred upon courts of appeals by the Magnuson/Moss Act, which speaks only to reviewing the final rule itself, together with the subsection (c) actions above-described.

Only 5 U.S.C. § 704--which, as we have pointed out above, is not an exclusionary mandate--would vest a court of appeals with reviewing authority over such issues as are raised herein.

Thus, there is left only the question of whether plaintiff has "other adequate remedy in a court" for the action of the defendants complained of herein (5 U.S.C. §704). The answer to that depends, of course, upon the adequacy of relief that would be obtainable if deferred to an appeal under 15 U.S.C. § 57a(e)(1)(A) from a final trade regulation rule promulgated pursuant to a full, completed rulemaking proceeding.

Such adequacy would require -

1) that even if the final rule were properly founded in every other respect, a court of appeals would nonetheless set it aside upon the sole ground of defendants' action complained of herein; and

2) that, upon the consequent remand and reopening of the rulemaking proceeding before the presiding officer, measures could be applied which would give the plaintiff relief as adequate as that which can now be granted by this Court.

Any allowance for reality must dictate that neither of these essentials can be assuredly anticipated.

The rulemaking proceeding is national in scope and will affect every advertiser of food products in this country. The hearings, some of which already have taken place, others of which are to be held in Dallas, Texas and Washington, D.C., and the rest of which are yet to be scheduled, probably will end up in various cities in virtually every section of the country. By the time they are concluded, and a final TRR promulgated, there will have been a countless number of witnesses, tens of thousands of transcript pages, an infinite number of written submissions, perhaps hundreds of complex legal and factual issues to be resolved and months, if not years, of time spent. By all indications, the record on appeal at that time will be mammoth. The number of issues presented to a court of appeals, and the required analysis and in-depth treatment of each of them, will necessitate extensive briefing and the expenditure of significant judicial time.

This Court is in a far better position to hear and consider plaintiff's case now - and without having to divert its attention to the multiplicity of other issues that will face a court of appeals upon ultimate review.^{17/} While,

17. Apart from questions as to the scope of the Commission's authority under the Magnuson/Moss Act, and first amendment issues, the magnitude of the factual issues is indicated by the Commission's very proposal and explanation, including its staff's statement and further proposals, as they appear in 39 Fed.Reg. 39342 et seq. (Nov. 11, 1974), attached as Exhibit 2 hereto.

theoretically, a court of appeals could consider plaintiff's within complaint as part of an overall appeal from a final rule, the mere mechanical limitations on the length of plaintiff's brief and the time for its oral argument would severely circumscribe its ability fully to present its case. If considered within the myriad of other arguments that likely will be heard by a court of appeals, plaintiff's within cause could not possibly be treated with anywhere near the complete judicial attention available to it in this action.

A court of appeals cannot be expected to allocate the time or concentration that this court can to the discrete matter here involved. Even if it could, it would be less likely to grant such relief to plaintiff at the expense of upsetting a final TRR at that late date and after all the resources that will have gone into it.

Plaintiff finds itself in the hazardous position of facing irreparable harm whether or not it attempts to wade through the mass of intermixed irrelevant and relevant documents now in the record. If plaintiff fails, prior to the hearings, to review and analyze the 45,000 documents in the record, it is exposed to the risk of having the content of some of those documents used against it without having prepared for that contingency. Alternatively, if plaintiff can and does analyze the entire record, it may deny itself, at great effort and expense, the relief to which it would

otherwise be entitled, i.e., which is sought herein.

Plaintiff's dilemma is not unlike that in which Abbott Laboratories found itself, supra, pp. 15-16. If it goes ahead and does what the Commission says it must (in Abbott it was the Food and Drug Administration), it moots its own case and destroys any possibility of benefiting from the remedy which it should enjoy. If it proceeds under the assumption that its position is correct, only to have a court of appeals ultimately disagree with it, it runs the grave risk of having a final rule promulgated which contains provisions that may not have been supportable (or included) had plaintiff engaged in cross-examination or made rebuttal submissions based upon its analysis of the full rulemaking record - relevant and irrelevant. Damned if it does; damned if it doesn't. Only immediate review can obviate the potentiality of plaintiff's being a loser one way or the other.

The cases cited and relied upon by defendants at page 10 of their memorandum recognize the right to immediate judicial review upon a showing that an administrative agency has acted in derogation of a statute resulting in injury to an individual or that an agency's action has violated an individual's constitutional rights. Both violations have occurred here; those cases support plaintiff.

Defendants further claim that the financial burden of participating in an administrative proceeding is not a

basis for judicial intervention. It relies on Myers v. Bethlehem Ship Building Corp. for the proposition that mere expense and inconvenience, without more, do not constitute irreparable injury.

But the obvious and telling difference between the Myers line of cases and the within action is that they involved only the burden of coping with relevant evidence. Here the issue is whether plaintiff must be forced to run the gauntlet of time, effort and expense of processing irrelevant masses of materials before it can get judicial relief from that very injury. Concededly, plaintiff could not complain of mere expense were the proceeding concerned with only relevant matters. But with the admitted irrelevancy of at least portions of the rulemaking record, and the demonstrated probability of far more extensive similar offensiveness, it has just cause for immediate complaint.

In an attempt to further bolster their claim that plaintiff has failed to show irreparable harm, defendants set forth an incredible argument at page 14 of their memorandum. They state that if plaintiff's contention concerning the irrelevancy of a significant portion of the record were true, then plaintiff's task of review and preparation for the hearings should be reduced substantially. Really? Just how do defendants propose the initial determination of relevancy be made? Obviously, unless the relief sought herein is granted, plaintiff itself will have to leaf through every

shred of paper in the record merely to discover which ones belong there. That's the essence of its complaint.

Defendants' admonishment to this Court that it not review the procedural rulings that are, as defendants would characterize them, "housekeeping" aspects of the proceeding fails to appreciate (or chooses to ignore) the substantive effects of statutory and constitutional violations. Their heavy reliance on The Coca-Cola Company v. FTC, 475 F.2d 299 (5th Cir. 1973) is misplaced. It is that very case which recognizes the right to immediate judicial intervention and review where there occurs agency action in disregard of a statutory command or in violation of a constitutional right, although neither was present in that case. See, footnote 13, supra at page 22.

Defendants' claim that an injunction to stay the rulemaking proceeding is not warranted is made without regard to the existing facts as demonstrated by plaintiff. It is beyond dispute that the record contains irrelevant matter, see for example Exhibit 1, and Weitzman affidavit, item 5. Indeed, defendants concede as much (Def. Mem., p. 3). Plaintiff has demonstrated the irreparable injury that will be inflicted on it should the requested relief be denied. Plaintiff has shown enough so that it likely will succeed on the merits. However, the necessity for an injunction will disappear, of course, as soon as this Court has ruled upon plaintiff's more essential request for expunction; and

defendants' arguments as to the former have no weight as to the latter.

Plaintiff has, as set forth in its complaint, given this Court a variety of valid jurisdictional bases. Beyond satisfying the lesser jurisdictional criteria of the Abbott Laboratories trilogy, it has demonstrated a violation of its constitutional rights, Fay v. Douds, pages 13-14, supra, and violation of a statutory prescription which adversely affects it, Leedom v. Kyne, pages 11-13, supra.

Conclusion

Upon the foregoing, defendants' motion should in all respects be denied and temporary relief be granted to plaintiff.

Dated: New York, New York
September 22, 1976

Respectfully submitted,

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7. G(1 & 2)d: Transcripts and Documents
from Legal Proceedings

This group of documents contains Federal Register notices and includes major food labeling regulations proposed or promulgated by FDA from 1971 to the present. They contain notices on Nutrition Labeling, Food Label Information Panel, Labeling for Cholesterol, Fats, and Fatty Acids, Foods for Special Dietary Use (as relating to vitamin and mineral compounds), Labeling of Flavors, Spices, Colorings and Chemical Preservatives, Exemptions from Food Labeling Requirements, etc. A list of subjects covered is included in document G(1 & 2)d-3, Exhibit B. From the titles of these documents alone it is obvious that only a few might be directly relevant to the subject matter of Phase I.

Three flagrant examples of irrelevant documents are: the notices on imitation food, subject of proposed 437.4 - not involved in any way in Phase I of this proceeding; standards of identity for special dietary supplements of vitamins and minerals addressed largely to restrictions on composition of these products - not relevant to Phase I; and, a booklet entitled "Compliance Procedures for Nutrition Labeling" which consists of only a statistical guide for technical analysts - it has no relevance to Phase I.

8. G(6 & 10)d-1: Dietary Food Hearing

These documents were transmitted to the Staff by the FDA Hearing Clerk in 21 bundles which the staff placed intact into the record of its proceeding. The Staff's description of these documents (Exhibit C) states that the materials were selected as relevant to 21 CFR Section 125.2 (b)(1) through (b)(6), (identical to Proposed 16 CFR Section 437.10(a)(1) through (6)). However, the presiding officer in his pre-hearing order for Phase I states:

Those statements which are prohibited in labeling by 21 CFR Section 1.17(i)(2), (3), (4) and (6) and by 21 CFR Section 125.2(b)(2), (3), (4) and (6) and which would be prohibited in advertising by the staff's proposed Section 437.10(a)(2), (3), (4) and (6) have been found by the Commissioner of the Food and Drug Administration to be scientifically false.

Since the validity of those findings are not part of this proceeding, no issues as to those sections have been designated.

Accordingly, no materials pertinent to Section 125.2(b)(2), (3), (4) and (6) are relevant yet the materials placed in the record cover the above sections plus all of the other issues of the Dietary Food Hearing.

A. Bundles 1-3 (2,075 pages)

The first three bundles contain Dietary Food Hearing Record transcript - 2075 pages.

I reviewed at least every fiftieth page for relevance. Attached as Exhibit D is a sub-sample of that sample of pages.

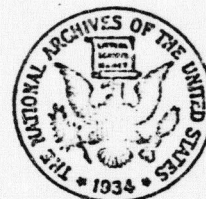
Registered Federal

MONDAY, NOVEMBER 11, 1974

WASHINGTON, D.C.

Volume 39 ■ Number 218

PART II



FEDERAL TRADE COMMISSION



FOOD ADVERTISING

Proposed Trade Regulation Rule
and Staff Statement

Exhibit 2

-195a-

FEDERAL TRADE COMMISSION

[16 CFR Part 437]

FOOD ADVERTISING

Proposed Trade Regulation Rule; Explanation of Proceeding and Analysis; Statement of Issues; Opportunity to Submit Data, Views or Arguments

Notice is hereby given that the Federal Trade Commission, pursuant to the Federal Trade Commission Act, as amended, 15 U.S.C. section 41 et seq., the provisions of Part I, Subpart B of the Commission's Procedures and Rules of Practice, 16 CFR 1.11 et seq., and section 553 of Subchapter II, Chapter 5, U.S. Code (Administrative Procedure) has initiated a proceeding for the promulgation of a Trade Regulation Rule concerning food advertising. In so doing, the Commission will entertain the written and oral presentation of data, views or arguments with respect to the provisions of and issues relating to the proposed rule, and with respect to issues relating to the proposal of further rule provisions requiring affirmative disclosures in food advertising.

In accordance with the above notice the Commission proposes to amend Subchapter D, Trade Regulation Rules, of 16 CFR Chapter I by adding a new Part 437 to read as follows:

Sec.

437.0 Preamble.

Subpart A—General

437.1 Definitions.

437.2 Form, content and method of making disclosures.

Subpart B—Voluntary Claims

437.3 Emphatic nutrition claims.

437.4 Nutrient comparison claims.

437.5 Nourishment claims.

437.6 Natural and organic food claims [Reserved].

437.7 Claims for foods intended to be combined with other foods.

437.8 Energy and calorie claims.

437.9 Fat, fatty acid and cholesterol content claims [Reserved].

437.10 Health and related claims [Reserved].

AUTHORITY: 38 Stat. 717, as amended; (16 U.S.C. 41-58).

§ 437.0 Preamble.

In connection with the advertising of foods in commerce, as "commerce" is defined in the Federal Trade Commission Act, for the purpose of inducing or which is likely to induce, directly or indirectly, the purchase of food, it is an unfair method of competition and an unfair or deceptive act or practice within the meaning of sections 5 and 12 of that Act to fail to comply with the following provisions of this Trade Regulation Rule.

Subpart A—General

§ 437.1 Definitions.

For the purpose of this rule the following definitions shall apply:

(a) "Advertisement" or "Advertising". Any written or verbal statement, illustration, or depiction, other than a label or in the labeling, which is designed to effect the sale of any food product, or to create interest in the purchase of such product, whether the same appears

in a newspaper, magazine, leaflet, circular, mailer, book insert, catalog, sales promotional material, other periodical literature (except professional or scientific journals), billboard, public transit card, or in a radio or television broadcast or in any other media. It does not include point-of-purchase advertising or any promotional material developed and/or disseminated by retail supermarket and food store establishments and wholesale food distributors the content of which refers solely to the price of an advertised food and which does not contain representations regarding nutrition, nourishment, or other nutrition claims relative to the product.

(b) "Food". Any article used for food or drink by humans, including chewing gum. However, it does not include:

(1) Special formula foods which are developed, intended or marketed exclusively for infants (persons not more than 12 months of age) and which provide the complete nutritional requirements of infants.

(2) Foods represented for use solely under medical supervision to meet nutritional requirements in specific medical conditions and advertised only in professional journals or publications.

(3) Alcoholic beverages subject to the provisions of the Federal Alcohol Administration Act of 1935 (27 U.S.C. section 201 et seq.).

(c) "Nutrients". Protein and those vitamins and minerals listed in 21 CFR 1.17(c) (7) (iv) and 21 CFR 125.1(b).

(d) "United States Recommended Daily Allowances" (U.S. RDA). The nutrients and levels established, subject to amendment, in 21 CFR 125.1.

(e) "Serving". That reasonable quantity of food suited for or practicable of consumption as part of a meal by an adult male engaged in light physical activity or by a child who is more than 12 months of age (when the food purports or is represented to be for consumption by any such child); or, if a nutrient label is affixed to the container of the advertised food, "serving" shall be the same measure as that which is stated on the label.

(f) "Portion." The amount of a food customarily used only as an ingredient in the preparation of a meal component or, if a nutrient label is affixed to the container of the advertised food, "portion" shall be the same measure as that which is stated on the label (e.g., ½ cup of flour, ½ tablespoon of cooking oil).

(g) "Clearly and Conspicuously Disclose". (1) Disclosing in a manner which can be easily understood (in the case of television and print advertising, also easily seen and read) by the casual observer, listener, or reader among members of the public and which conforms (except where otherwise provided in this rule), for advertising in any media, in all relevant respects to the Commission's Statement of Enforcement Policy of October 21, 1970. (See Vol. 2, CCH Trade Regulation Reporter section 7569.09.) Each disclosure shall be presented in the same language principally employed in the advertisement. (See Commission's Statement of Policy of July 24, 1973, as amended, 38 FR 21494-95.)

(2) In any television advertisement any disclosure of information shall be made in the manner and form prescribed by § 437.2(g).

(3) In any print advertisement any disclosure of information shall be made in the manner and form prescribed by § 437.2(h).

(h) "Representation" or "Represent". Any direct or indirect statement, suggestion or implication in advertising, including but not limited to one which is made orally, in writing, pictorially, or by any other audio or visual means, or by any combination thereof.

(i) "Protein Efficiency Ratio" (PER). The protein efficiency ratio (PER) shall be determined in accordance with the method described in 21 CFR 1.17(c) (4).

§ 437.2 Form, content and method of making disclosures.

Any disclosure required or described by any provision of this rule shall be made in accordance with the following general provisions of this rule and as may be specifically prescribed in a section dealing with that particular disclosure.

(a) *Nutrients*. (1) Any advertisement which contains a representation concerning a nutrient or a disclosure of a nutrient shall make such representation or disclosure only from among the nutrients listed in 21 CFR 1.17(c) (7) (iv) and 21 CFR 125.1(b).

(2) A food shall not be represented in advertising as containing a nutrient, unless (i) the nutrient's (a) identity (stated as the common or usual name) and (b) amount (expressed as a percentage of the U.S. RDA contained in a stated serving of the advertised food) are clearly and conspicuously disclosed in accordance with all the provisions of this subpart of this rule, and unless (ii) a serving of such food contains the identified nutrient in an amount of 10 percent or more of the U.S. RDA; *provided, however*, That, in instances where a food or a serving thereof is not required to contain a nutrient at a certain percentage of the U.S. RDA before a voluntary claim is made, an advertisement may represent the presence of nutrients contained in amounts of less than 10 percent of the U.S. RDA per serving if the identities of all nutrients required to be disclosed by 21 CFR 1.17 when a nutrition claim is made, as well as their respective percentages of the U.S. RDA per serving (including zero percent), are clearly and conspicuously disclosed in accordance with all of the provisions of this subpart of this rule. If a food or a serving thereof is required to contain any nutrient at a certain percentage of the U.S. RDA before a voluntary claim may be made (see Subpart B), the actual percentage (prior to any rounding off) of the U.S. RDA at which any such nutrient is contained in the advertised food or a serving thereof shall determine whether the condition(s) for making the claim has (have) been satisfied.

(3) An advertised food or a serving thereof may not be represented as containing a nutrient in an amount of 50 percent or more of the U.S. RDA, unless such food or serving contains the identi-

fied nutrient only in a naturally occurring (indigenous) form or such nutrient has been added in compliance with 21 CFR 1.17(a) (2).

(4) Disclosures of nutrients shall be expressed to the nearest two percent increment up to and including the 10 percent level; to the nearest five percent increment above the 10 percent level and up to and including the 50 percent level; and to the nearest 10 percent increment above the 50 percent level. If the percentage falls equidistant between the upper and lower increment in any percentage level, the disclosure shall be expressed as the lower increment.

(b) *Protein.* (1) The percentage of the S. RDA of protein present per serving of the advertised food shall be based on a U.S. RDA of 45 grams of protein, if the total protein has a PER equal to or greater than the PER or casein; or based on a U.S. RDA of 65 grams of protein, if the total protein has a PER less than that of casein.

(2) Except with respect to the amount of protein as permitted by the proviso in paragraph (a) (2) of this section, representations in advertising of the presence of protein may be made only if a serving of the advertised food contains protein at a level of 10 percent or more of the U.S. RDA and the total protein in the advertised food alone has a PER of 20 percent or more of the PER of casein.

(c) *Analytical methods.* The procedures and methods used for determining the amount of any nutrient contained in an advertised food shall be in accord with the provisions of 21 CFR 1.17 or, where applicable, 9 CFR.

(d) *Calories.* The energy content of a food shall be stated in calories per serving, expressed to the nearest two calorie increment up to and including 20 calories; to the nearest five calorie increment above 20 calories and up to and including 50 calories; and to the nearest 10 calorie increment above 50 calories. Calorie content shall be determined in the manner described in 21 CFR 1.17(c) (3).

(e) *Serving or portion.* Statements regarding servings or portions shall be consistently stated in terms of a convenient unit of such food or a convenient unit of measure that can be easily identified as an average or usual serving or portion and can be readily understood as such by purchasers of such food. Servings or portions may be expressed in terms of ounces, fluid ounces, tablespoonfuls, cupfuls, or other customary or usual units, and shall be consistent with the applicable provisions of 21 CFR 1.17. Provisions of this rule which refer to "servings" shall be construed to mean "portions" if the use of the latter term would be more appropriate with respect to a particular food or ingredient.

(f) *Identification and designation of foods.* A food shall be identified or designated in accordance with any applicable Federal regulations prescribed in the Code of Federal Regulations. Non-standardized foods shall be identified or designated by their respective common or usual names, if such exist, pursuant to 21 CFR Part 102.

(g) *Television advertisements—method and form of disclosures.* Under § 437.2

(a) and (b) and Subpart B of this rule, any disclosure in any television advertisement shall be made in the same portion (audio or video) of the advertisement in which the voluntary claim is made. The video portion of the disclosure in each advertisement shall be prominently displayed in the form of a super or title, or prominently displayed on the screen by itself so as to enable it to be completely and easily seen and read on all television sets, regardless of picture tube size, that are commonly available for purchase by the consuming public. Any disclosure required by Subpart B of this rule in any advertisement shall be made in immediate conjunction with the voluntary claim which creates the requirement for such disclosure.

(h) *Print advertisements—method and form of disclosures.* (1) Any disclosure in a print or display advertisement shall be prominently displayed in any sans serif type style consistent with the requirements set forth in § 437.1(g) (1) and hereinbelow, but in no event in condensed type. The type shall be set on a slug at least one point larger than the point size of the type (not solid), using only normal word and letter spacing. A determination of whether a particular disclosure is "clear and conspicuous" within the definition set forth under § 437.1(g) (1) of this rule shall be made by examining the context of the total advertisement, but in no event shall a disclosure be deemed clear and conspicuous unless it appears in type of at least the following sizes, size being measured by the height of the smallest letter employed in making the disclosure:

(i) At least $\frac{1}{16}$ inch type, in advertisements of a trim size not larger than 65 square inches.

(ii) At least $\frac{3}{32}$ inch type, in advertisements of a trim size larger than 65 square inches, but not larger than 110 square inches.

(iii) At least $\frac{1}{8}$ inch type, in advertisements of a trim size larger than 110 square inches, but not larger than 180 square inches.

(iv) At least type of a size bearing the same proportion to the size of the advertisement as the proportion of $\frac{1}{8}$ inch to 180 square inches, in print advertisements of a trim size larger than 180 square inches.

(v) For any billboard or other display advertisement (except one which is located in the interior of a public transit vehicle) normally viewed and read from a distance substantially greater than the normal range of reading distances for a book, newspaper, magazine, or other similar printed reading matter:

(a) At least $\frac{1}{4}$ inch type in advertisements of a trim size larger than 180 square inches, but not larger than 270 square inches.

(b) At least $\frac{1}{2}$ inch type in advertisements of a trim size larger than 270 square inches, but not larger than 1500 square inches.

(c) A size of one inch per 3000 square inches times the area of the advertisement expressed in square inches, [i.e., $\text{size} = (1 \text{ inch}/3000 \text{ square inches}) \times (\text{area of the advertisement in square inches})$], but in no event of a size less than $\frac{1}{2}$

inch, in advertisements of trim size larger than 1500 square inches.

(2) If a print advertisement appears on more than one page, and if the total area of the advertisement is greater than the area of the largest page upon which it appears, the required type size shall be determined as though the advertisement were of an area equal to the area of the largest page upon which it appears.

(3) In the case of advertisements that are in whole or part lighted or reflectively surfaced or advertisements otherwise prepared for enhanced visibility, any disclosure shall be lighted or otherwise treated in the same manner as the most prominently lighted or otherwise specially treated portion of the advertisement.

(4) For multi-sided displays and like advertising material, the required type size shall be determined as though the advertisement were of an area equal to the area of the major display area of the display, and any disclosure shall be prominently positioned upon such display area.

(5) For unusual advertising materials or materials too small to reasonably comply with the requirements of paragraphs (h) (1) through (4) of this section, the Commission may establish acceptable alternative forms of making the required disclosures. A petition formally requesting permission to utilize an alternative form of disclosure may be submitted to the Secretary for due consideration by the Commission.

Subpart B—Voluntary Claims

§ 437.3 Emphatic nutrition claims.

Emphatic, extraordinary, positive or similar claims concerning the nutritional value of a food with general or specific reference to any nutrient(s) contained in such food, including but not limited to the use of terms such as "lots (or 'full') of -----", "high (or 'rich' in -----)", "packed (or 'loaded') with -----", and "excellent (or 'significant or 'good') source of -----" shall not be used in advertising unless:

(a) The identity of any nutrient upon which the claim is based, as well as the percentage of the U.S. RDA per stated serving provided by each such identified nutrient, is clearly and conspicuously disclosed; and

(b) A serving of the advertised food contains each nutrient identified pursuant to paragraph (a) of this section in an amount of at least 35 percent of the U.S. RDA.

§ 437.4 Nutrient comparison claims.

(a) Representations in advertising which make a comparative claim for the amount of any nutrient contained in an advertised food shall not be made, unless:

(1) The comparison is with an equal-sized serving of a commercially available food; and

(2) If a serving of the advertised food contains the same number of calories as or fewer calories than an equal-sized serving of the compared food, the compared food contains no more than two nutrients in amounts greater by 10 percent or more of the U.S. RDA than the amounts (including zero percent) at

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which the same two nutrients are contained in a serving of the advertised food; and

(3) If a serving of the advertised food contains more calories than an equal-sized serving of the compared food, the compared food contains no more than two nutrients in amounts greater on a per 100 calorie basis than the amounts (including zero percent) at which the same two nutrients are contained in a serving of the advertised food; and

(4) If the comparison concerns protein, a serving of the advertised food contains protein of at least the same quality as that contained in an equal-sized serving of the compared food; and

(5) The identities of the advertised and compared foods are clearly and conspicuously disclosed; and

(6) The advertised food and the food with which it is compared normally serve the same purpose in the diet; and

(7) The same nutrients are compared and the name of each such compared nutrient is clearly and conspicuously disclosed; and

(8) The percentage of the U.S. RDA of each compared nutrient provided by a stated serving of the advertised food is clearly and conspicuously disclosed; and

(9) If an advertised food is represented as one which contains any nutrient in any amount greater than the amount of such nutrient in another food, the amount contained in a serving of the advertised food exceeds that contained in an equal-sized serving of the compared food by at least 10 percent of the U.S. RDA.

(b) A food shall not be represented in advertising to be a substitute or replacement for another food (unless it is a food labeled "imitation" in compliance with 21 CFR 1.8), or as nutritious as another food, unless:

(1) A serving of the advertised food contains at least the same nutrients as those nutrients contained in an amount of 2 percent or more of the U.S. RDA in an equal-sized serving of the compared food, and each such nutrient is present in the advertised food in an amount which is at least equivalent to the amount at which each is contained in an equal-sized serving of the compared food; and

(2) If the compared food contains protein, a serving of the advertised food contains protein of at least the same quality as that contained in an equal-sized serving of the compared food; and

(3) The identity of the compared food and number of calories provided by equal-sized, stated servings of the advertised and compared foods, respectively, is clearly and conspicuously disclosed; and

(4) If the advertised food contains a higher fat content than the compared food, such fact, as well as the total fat content (in accordance with 21 CFR § 1.17(c)(6) and 1.18(c)(2)(i)), is clearly and conspicuously disclosed; and

(5) If an advertisement is for a food labeled "imitation" in compliance with 21 CFR 1.8, it is clearly and conspicuously disclosed that such food is not as nutritious as the food for which it is intended to be a substitute or replacement.

(c) A food shall not be represented in advertising to be nutritionally superior to another food, unless:

(1) The nutrients in a serving of the advertised food provide at least 10 percent more of the U.S. RDA than are provided by those nutrients contained in an amount of 2 percent or more of the U.S. RDA in an equal-sized serving of the compared food; and

(2) If the compared food contains protein, a serving of the advertised food contains protein of at least the same quality as that contained in an equal-sized serving of the compared food; and

(3) The identity of the compared food and number of calories provided by equal-sized, stated servings of the advertised and compared foods, respectively, is clearly and conspicuously disclosed; and

(4) If the advertised food contains a higher fat content than the compared food, such fact, as well as the total fat content (in accordance with 21 CFR 1.17(c)(6) and 1.18(c)(2)(i)), is clearly and conspicuously disclosed.

§ 437.5 Nourishment claims.

(a) An advertisement shall not represent a food to be "nourishing", "wholesome", "nutritious", or use any other term of similar import which in any way states, suggests or implies that such food is a valuable or significant source of nutrition, unless a serving of the food contains at least four nutrients, including protein, each of which is present in an amount of at least 10 percent of the U.S. RDA per 100 calories, and unless at least one of such nutrients is present in a serving of such food in an amount of at least 10 percent of the U.S. RDA; provided, however, That such terms may be used to describe any identified nutrient(s) which is (are) contained in such food (e.g., "nutritious Vitamin C"), subject to the provisions of § 437.2(a)(2) of this rule.

(b) A food or a serving thereof shall not be represented in advertising as providing all of the nutrients necessary for a sound, complete or balanced diet, unless it satisfies the U.S. RDA requirements for protein, vitamins and minerals prescribed in 21 CFR Part 125, and unless competent and reliable scientific tests demonstrate that such food is a total diet replacement.

(c) Subject to the provisions of paragraph (b) of this section, an advertisement shall not represent that an advertised food or a serving thereof alone is "perfect" or "nutritionally perfect", provides "complete nutrition", contains "all the good things you need", or use any other term of similar import which in any way states, suggests or implies that consumption of only the advertised food will provide enough nutrition to constitute a sufficient and full source of nutrition; or that consumption of the advertised food or a serving thereof maintains health, makes an individual well-fed or in any way is a unique, special or exclusive source of nutrition or health benefits.

(d) An advertisement shall not represent that a food or a serving thereof constitutes a nutritionally adequate meal,

unless such advertised food or serving thereof complies with an applicable Federal regulation prescribed in the Code of Federal Regulations.

§ 437.6 Natural and organic food claims. [Reserved]

[See Explanation of Proceeding and Analysis and Statement of Issues by Section.]

§ 437.7 Claims for foods intended to be combined with other foods.

(a) If, in order to prepare a food for consumption, it is necessary for a consumer to add to an advertised food any other food(s), characterizing ingredient(s) or component(s), as such ingredient(s) or component(s) is (are) defined in 21 CFR 102.1, that fact shall be clearly and conspicuously disclosed in any advertisement for such food.

(b) An advertisement for a food described in paragraph (a) of this section may represent that consumption of a serving of the combination provides a designated percentage of the U.S. RDA of each of the nutrients contained in a serving of such combination, subject to the provisions of § 437.2(a)(2) of this rule. However, a representation that the advertised food alone provides a designated percentage of the U.S. RDA of the nutrients which are contained in a serving of such combination shall not be made.

(c) If a serving of the food(s), ingredient(s) or component(s) with which an advertised food is (are) necessarily combined contributes more than 50 percent of the U.S. RDA of any nutrient named in the advertisement, it shall be clearly and conspicuously disclosed that most of such nutrient is provided by such food(s), ingredient(s) or component(s).

(d) If an advertised food is frequently, but not necessarily, combined with any other food(s), ingredient(s) or component(s) for consumption, any representation regarding nutrition shall be based on the nutritional value of the advertised food alone.

§ 437.8 Energy and calorie claims.

(a) An advertisement shall not represent that a food or nutrient contains, produces, provides, enhances, or is a source of "energy" or "food energy", or use any other word, demonstration or depiction of similar import, unless it clearly and conspicuously discloses, in immediate conjunction with the making of each such representation, that "energy" or "food energy" is supplied by calories, as well as the number of calories contained in a stated serving of the advertised food.

(b) An advertisement shall not represent that consumption of a food or nutrient, by itself, will produce or provide health, general vigor, sustained energy or alertness, or that the energy from calories, by itself, will produce or provide strength, endurance, intellectual performance, or the prevention or relief of fatigue.

(c) An advertisement shall not represent that consumption of a food in any way enhances or contributes to a person's vigor, energy, alertness, strength or endurance, unless it clearly and conspicuously discloses, in immediate con-

junction with the making of each such representation:

(1) That such vigor, energy, alertness, strength or endurance is enhanced by and depends, in part, upon the calories in the food; and

(2) The number of calories contained in a stated serving of the advertised food.

(d) An advertisement shall not represent that consumption of any food or meal is useful for, or contributes in any way to, or is useful in, regulating, or maintaining caloric intake or body weight by the use of any demonstration or depiction, or any word or phrase such as "diet", "dietetic", "low calorie", "low in calories", "fewer calories", "calorie reduced", "contains artificial sweeteners", "artificially sweetened", or any other demonstration, depiction or term of similar import, unless:

(1) The advertised food complies with the provisions of 21 CFR 125.6; and

(2) The number of calories contained in a stated serving of the advertised food is clearly and conspicuously disclosed.

(e) An advertisement for a food which makes any representation described in paragraph (d) of this section, and which contains any artificial sweetener, except one which serves an authorized technological purpose (as defined in 21 CFR 125.1(i)) shall comply with the provisions of paragraphs (d)(1) and (2) of this section, and

(1) Shall clearly and conspicuously disclose the number of calories contained in a stated, equal-sized serving of the same food made with nutritive sweeteners; and

(2) If the artificially sweetened product contains a nutritive sweetener, the advertisement shall clearly and conspicuously make the following specific disclosure:

This food contains sugars and should not be used by diabetics without the advice of a physician.

(f) An advertisement shall not represent that a food is "sugarless", "sugar free", "contains no sugar" or use any other term of similar import, unless such food contains no sugars, including, but not limited to, sorbitol, mannitol, or other hexitol(s).

§ 437.9 Fat, fatty acid and cholesterol content claims. [Reserved]

[See Explanation of Proceeding and Analysis and Statement of Issues by Section.]

§ 437.10 Health and related claims. [Reserved]

[See Explanation of Proceeding and Analysis and Statement of Issues by Section.]

EXPLANATION AND BASIS OF PROCEEDING

The instant proceeding is designed for three purposes:

(1) To elicit comment on the Proposed Trade Regulation Rule on Food Advertising and on certain issues relating to voluntary claims in food advertising as to which the Commission has not as yet proposed particular rule provisions.

(2) To elicit comment on the issues raised by the Staff Statement of Fact, Law and Policy, including, in particular,

the form which the disclosures called for therein should take.

The Proposed Trade Regulation Rule on Food Advertising is designed to eliminate deception and unfairness which may result from the making of certain affirmative claims with respect to nutrition. This proposed rule establishes uniform definitions for certain terms the use of which is subject to ambiguity and deception, and prohibits outright certain other claims the making of which is deceptive.

The Commission has long been recognized to have the power to prohibit claims that are deceptive or unfair.¹ The Commission has prohibited such claims by the promulgation of trade regulation rules in the past,² and has similarly utilized rules to establish preconditions to the making of certain claims heretofore.³ Similarly, the courts have often affirmed the power of the Commission to order disclosure as a condition of making claims which would otherwise be deceptive.⁴ In view of the considerable importance of nutrition information to consumers, as described in the staff statement, and in view of the deception and unfairness which may result from the use of various terms and claims relating to nutrition, the Commission believes that an adequate basis now exists to warrant promulgation for comment of a proposed rule regulating the use of such terms and representations.

In addition, the staff of the Commission is of the view, for reasons described at length in its statement, that it is an unfair and deceptive act or practice under section 5 for advertisers of food products to fail to disclose affirmatively certain information concerning the nutritive quality of advertised food products. The Commission is extremely concerned about the considerations discussed in the staff statement, including the implications for food advertising raised by the Food and Drug Administration's nutrient labeling program. The Commission has therefore concluded that it is in the public interest to solicit comment on the staff statement, including, in particular, the form which the affirmative disclosures called for in that statement might take.

¹ *Sears, Roebuck & Co. v. F.T.C.*, 258 F. 307 (7th Cir. 1906). See also, "Developments in the Law—Deceptive Advertising," 80 Harv. L. Rev. 1005, 1019-1027 (1967).

² See, e.g., *Incandescent Lamp (Light Bulb) Industry*, 16 CFR 409; *Power Output Claims for Amplifiers Utilized in Home Entertainment Products*, 39 FR 15387 (May 3, 1974).

³ See, e.g., *Guides For the Feather and Down Products Industry*, 16 CFR Part 253; *Trade Regulation Rule: Misbranding and Deception As To Leather Content of Waist Belts*, 16 CFR Part 409.

⁴ *J. B. Williams Co. v. F.T.C.*, 381 F.2d 884 (6th Cir. 1967); *Keefe Hair & Scalp Specialists, Inc. v. F.T.C.*, 275 F.2d 18 (5th Cir. 1960); See also, *P. Lorillard Co. v. F.T.C.*, 186 F.2d 52, 58 (4th Cir. 1950) ("To tell less than the whole truth is a well known method of deception; and he who deceives by resorting to such method cannot excuse the deception by relying upon the truthfulness per se of the partial truth by which it has been accomplished.")

ANALYSIS AND STATEMENT OF ISSUES BY SECTION

This Analysis and Statement of Issues by Section is designed to facilitate comment on the Proposed Trade Regulation Rule on Food Advertising and on the staff statement respecting affirmative disclosure and to designate the issues which the Commission is particularly interested in having addressed during the time period provided for written comments. The issues which have been designated include matters of fact, law and public policy. Although the Commission has not finally determined the procedures that will be employed in a public hearing, it is the Commission's present intent to limit oral comment to issues of fact. Thus, any comments upon questions which relate to legal or public policy considerations should be submitted in writing. Since additional issues of fact may be raised by the written comments, a revised list of factual issues (which will not include the non-factual issues designated in this statement) will be specified prior to hearings on the proposed rule and staff statement.

The designation of issues in this Analysis and Statement of Issues by Section is not intended to limit public comment on the proposed rule and staff statement. Rather, the Commission invites the general public and all interested parties to comment in writing on any and all questions of fact, law or public policy raised by the proposed rule and the staff statement. Likewise, publication of the present proposed rule and staff statement is intended to invite rather than discourage comment concerning the content of a rule regulating food advertising.

All comments should be referenced specifically to the proposed rule or staff statement. Comments opposing the proposed rule or specific provisions in it should either argue, with reasons and data, why no rule at all should be imposed, or should propose a specific alternative. Proposals for alternative regulations should include reasons and data which indicate why the proposed alternatives would better serve the purposes of the proposed rule, including reasons and data showing how their adoption would better mitigate the deception or unfairness in food advertising. All comments should be supported by a full exposition of all relevant factual evidence and legal arguments.

Comments asserting matters of fact not based upon firsthand knowledge or personal experience of the person commenting or matters of fact or opinion requiring some special practical experience, training or education not possessed by the average layperson will be considered only if they are made and signed by a named person shown to possess such experience, training or education as to qualify him or her comment on the particular matter. The Commission also invites comments from all interested parties, including laypersons, which are shown to be based directly on firsthand knowledge, personal experience or general understanding of the particular issues, such as the desire or need for the information or standards required to be

disclosed or implemented by the proposed rule.

The proposed rule consists of a preamble and two parts. Subpart A sets forth the definitions of terms embodied in the proposed rule and establishes the specific form, content and method for making disclosures required by the proposed rule. Subpart B establishes specific requirements which must be met before certain affirmative nutrition claims can be made in food advertising.

Subpart A—General

§ 437.1 Definitions.

(a) "Advertisement" or "Advertising".

Under this definition, the proposed rule covers all food advertising with the following two exceptions:

1. Advertisements promulgated by retail supermarkets, food stores and wholesale food establishments if

a. The contents of the advertisements relate only to price; and

b. The advertisements contain no nutrition claims; and

2. Point-of-purchase advertising for all foods.

(b) "Food".

Self-explanatory.

(c) "Nutrients".

This provision adopts, for purposes of the proposed rule, a definition of nutrients which parallels the definition utilized by the Food and Drug Administration in connection with its nutrient labeling program. The definition specifically includes protein and those other "primary" and "optional" nutrients (see Analysis and Statement of Issues by Section, § 437.2(a)) for which a U.S. Recommended Daily Allowance (U.S. RDA) has been established, namely Vitamin A, Vitamin D, Vitamin E, Vitamin C, Folic Acid, Thiamine, Riboflavin, Niacin, Vitamin B₆, Vitamin B₁₂, Biotin, Pantothenic Acid, Calcium, Phosphorus, Iodine, Iron, Magnesium, Copper, and Zinc. It does not include other vitamins or minerals which are recognized as essential to human life but which have no established U.S. RDA. Nor have carbohydrates, fats, and water been included in the proposed rule's definition of "nutrients". The definition is restricted in this manner so as to limit criteria for claims established by Subpart B to those nutrients which are not only recognized as essential but for which the recommended daily quantities have been determined.

ISSUES

1. Would it better serve the purposes of the proposed rule to expand the definition of "nutrients" to include nutrients for which there is no established U.S. RDA? If so, which nutrient(s)?

(d) "United States Recommended Daily Allowances" (U.S. RDA). This provision, by adopting the FDA-approved method for expressing in labeling the nutritional value of a food, enhances the compatibility of the proposed rule's advertising disclosures with the FDA required labeling disclosures.

(e) "Serving". This provision is also designed to promote consistency between advertising and labeling claims by requiring nutrition claims in advertising

to be based on the same serving size that appears on the label.

(f) "Portion". Again, the purpose of this provision is to achieve consistency between advertising and labeling claims.

(g) "Clearly and conspicuously disclose". This provision is intended to ensure that the disclosures required by the proposed rule will be visible and comprehensible to viewers or readers and is based upon the relevant Commission policy statements setting forth standards for clear and conspicuous disclosure. This provision is linked to other provisions of the proposed rule which set forth specific requirements for disclosures in television and print advertising.

(h) "Representation" or "Represent". Self-explanatory.

(i) "Protein Efficiency Ratio" (PER). This provision adopts the same method for determining the quality of a protein as that which was adopted by the Food and Drug Administration in connection with its nutrient labeling program.

§ 437.2 Form, content and method of making disclosures.

(a) *Nutrients*. This provision sets forth certain requirements with respect to representations concerning or disclosures of nutrients in advertising. This particular section is designed to ensure that any disclosures or representations of nutrient content of a food which are governed by the proposed rule will be made in a uniform manner so that they can be most easily understood and utilized by consumers in evaluating advertised foods and in comparing the nutritional values of advertised foods.

Subparagraph (1) provides that all disclosures or representations concerning nutrients must be made from among the nutrients for which there is an established U.S. RDA.

Subparagraph (2) requires the disclosure of a nutrient's identity (common and usual name) and amount (percentage of U.S. RDA) per stated serving each time a claim is made.

Subparagraph (2) further establishes the level of significance for advertising disclosures of nutrients at 10 percent of the U.S. RDA per stated serving. Since space is limited in advertising and it appears that advertising disclosures of nutrient content will be interpreted as positive statements about the food's content of that nutrient, disclosures or claims of nutrient content are permitted only if a nutrient is present in a significant amount. FDA's nutrient labeling program also prohibits claims that a food is a significant source of a nutrient unless the nutrient is present in a food in an amount of at least 10 percent of the U.S. RDA, although FDA requires disclosure of the amounts at which each of the eight primary nutrients is contained in a serving, including zero percent, thereby achieving a complete nutrition profile of specific nutrient data on the label, that may not be an appropriate required disclosure for all television and radio advertising.

If a particular provision of the proposed rule does not establish a minimum quantitative level at which a nutrient must be present before a voluntary

claim may be made,* this subparagraph would permit a representation regarding a nutrient which is not contained in a significant amount, provided that there is full disclosure, in a clear and conspicuous form and manner as required by the proposed rule, of the identities and percentages (including zero percent) of the U.S. RDA per serving of all of the primary nutrients. In this instance, it is intended that any possibly deceptive implication that an identified nutrient is present in a nutritionally significant amount (10% or more of the U.S. RDA per serving) when such is not the fact will be effectively prevented by requirements which ensure that a fair and relatively full disclosure of the food's overall nutritional value is provided and that such a disclosure is clearly and conspicuously made in a form and manner which is suited to the particular advertising medium chosen by the advertiser to make the representation.

Subparagraph (2) also requires that the actual percentage of the U.S. RDA of a nutrient in an advertised food—prior to rounding-off—will be used to determine if the requirements for disclosure or for making a voluntary claim under Subpart B of the proposed rule have been met.

Subparagraph (3) allows claims referring to nutrient content in excess of 50% of the U.S. RDA only where the nutrient naturally occurs at those levels in the food or the food has been fortified in compliance with regulations of the Food and Drug Administration.

Subparagraph (4) provides for rounding-off of percentages of the U.S. RDA in nutrient disclosures. This is designed to prevent consumers from being misled by insignificant differences in the nutrient content of two foods.

ISSUES

1. Is it appropriate to permit in advertising (television? radio? print?) representations regarding nutrients which are not present in nutritionally significant amounts in view of the fact that a disclosure of the complete nutrition profile of specific nutrient data on the label will be required; or should such truthful representations be prohibited in advertising (television? radio? print?) due to the possibly misleading implications of nutritional significance that might follow from any reference to the presence of such nutrients?

(b) *Protein*. This provision is intended to prohibit claims for protein unless the protein is present in the advertised food in a significant quantity (except as otherwise permitted by the proviso contained in § 437.2(a)(2)) and the quality of the protein is sufficient so that it may be utilized by the human body in a meaningful way. It is based on the principle that individuals must eat a greater quantity of low quality protein to fulfill their nutritional requirements than they must eat if the protein is high in quality. The method of computation is the same as

*Section 437.3(b) illustrates a provision which does require the presence of a nutrient in a specified amount before any claim may be made.

that used by the Food and Drug Administration in its nutrient labeling regulation.

ISSUES

1. Are the proposed standards for protein quality and quantity sufficiently high? If not, what other standards might be established which would be sufficiently compatible with the nutrient labeling program standards so as to neither confuse consumers nor unreasonably burden advertisers?

2. Should the proviso contained in § 437.2(a)(2) apply to representations regarding the quantity of protein as well as such representations relating to those vitamins and minerals considered as "nutrients"?

(c) *Analytical methods.* This provision requires the same methods of laboratory analysis to be used in connection with nutrient disclosures and claims in advertising as are used for nutrient labeling under the Food and Drug Administration's program.

(d) *Calories.* Calorie content is to be measured by the same methods used in the Food and Drug Administration's labeling program. This provides for the rounding-off of calorie content so that consumers will not be misled into thinking that one product is superior to another based on an insignificant difference in their caloric contents.

(e) *Serving or portion.* This provision is directly based on the Food and Drug Administration's regulation on serving sizes for the nutrient labeling regulations in order to promote consistency between labeling and advertising.

(f) *Identification and designation of foods.* This provision requires food advertisers to use the name of a food that the Food and Drug Administration has determined to be appropriate, when such a determination has been made.

(g) *Television advertisements—method and form of disclosure.* This provision is intended to ensure that the required disclosures of nutrition information are made in an intelligible manner. It states that all disclosures required by Subpart B of the proposed rule must be made in the same portion of the advertisement and in immediate conjunction with the voluntary claim which triggers the requirement for such disclosure. It also sets forth requirements for any disclosures in the video portions of such advertisements.

(h) *Print advertisements—method and form of disclosures.* This provision establishes minimum specifications for disclosures made in print advertisements to be certain that the information required to be disclosed is presented in an easily intelligible manner. It should be noted that although a disclosure failing to meet these standards would be per se inadequate under the proposed rule, a disclosure that does meet these standards would not be per se adequate, since whether or not a given disclosure is clear and conspicuous can be judged only in the total context of the advertisement in which it appears.

ISSUES

1. Will the proposed specifications adequately ensure that disclosures are clear, conspicuous and comprehensible to consumers?

2. What alternative specifications, if any, would serve the purpose of the rule as well as, or better than, the proposed specifications, while further reducing the burden on advertisers?

Subpart B—Voluntary Claims

§ 437.3 Emphatic nutrition claims.

Vague claims mentioning nutrients are often used to exaggerate the nutritional characteristics of a food without providing any specific information concerning the actual value of the food. To remedy this unfair and deceptive practice, the proposed rule establishes minimum standards for the making of emphatic claims.

Under the proposed rule emphatic nutrition claims may be made only when:

1. The identity of any nutrient on which the claim is based is disclosed;
2. The percentage of the U.S. RDA of any identified nutrient contained in a stated serving of the advertised food is disclosed; and
3. A serving of the advertised food contains at least 35% of the U.S. RDA of each nutrient identified as a basis for an emphatic claim.

The 35% minimum is designed to ensure that a food for which emphatic nutrition claims are made makes a highly significant contribution of the claimed nutrient to the diet. Thus, such a food would have to contribute approximately one-third of the U.S. RDA for that nutrient.

While claims that a food "contains lots of nutrients" or "is rich in vitamins" could be made under the Proposed Rule, by requiring identification of nutrients and the percentage of U.S. RDA the rule would eliminate the vagueness which has heretofore attended such claims. (See also Analysis and Statement of Issues by Section, explanation of § 437.2(a)(2).) A claim that a food is a "good source of Vitamin C" would also be improper unless the percentage of Vitamin C in a normal serving size were disclosed and it constituted more than 35% of the U.S. RDA for the nutrient.

ISSUES

1. Is the fact that a serving of food contributes 35% of the U.S. RDA of the claimed nutrients a sufficient contribution to the diet to justify an emphatic claim?

2. Is there a lower percentage contribution which is sufficient to justify an emphatic claim?

§ 437.4 Nutrient comparison claims.

(a) *Comparative claims for the amount of any nutrient.* This provision specifies the prerequisites for making a comparative claim dealing with specific nutrients, e.g. that "Food X is higher in (or 'contains more') Niacin than Food Y". The basic reasons for establishing various prerequisites to the making of such a claim are to be certain that: The exact nature and scope of the claim is

clearly stated; equal-sized servings of commercially available foods are compared (in order to prevent dangling comparatives such as "more Vitamin C" or "highest in the Calcium"); a claim by one food that it contains a higher content of a particular nutrient than another food is based on a significant difference (10% of the U.S. RDA); and the advertised food and the compared food are relatively similar in all other respects. The last requirement is necessary to avoid the potentially deceptive implication that an advertised food is nutritionally superior to a compared food just because it contains more of one nutrient, even though in all or most other respects the compared food is nutritionally more valuable. Thus, the measure of parity is not only those nutrients present both in the compared food and the advertised food but, rather, all nutrients present in the compared food in significant amounts.

Three of the requirements for assuring relative nutritional parity are therefore:

1. The two foods must normally serve the same purpose in the diet;
2. If the comparison concerns protein, the protein in the advertised food must be of at least the same quality as that contained in the compared food; and
3. If the advertised food contains the same or fewer calories than an equal-sized serving of the compared food, not more than two nutrients can be present in the compared food in amounts greater by 10% or more than the amounts at which the same two nutrients are contained in the advertised food.

EXAMPLE.—Actual percent of U.S. RDA per serving*

	Advertised food X	Compared food Y
Protein..... percent..	4	11
Vitamin A..... do.....	61	16
Vitamin C..... do.....	11	31
Thiamine..... do.....	23	15
Riboflavin..... do.....	22	24
Niacin..... do.....	30	51
Calcium..... do.....	0	0
Iron..... do.....	21	38
Calories..... do.....	120	140

*This hypothetical example is designed only to illustrate the operation of the proposed rule. It should be noted that the percentage comparisons must be made on the basis of the actual amount at which each nutrient is contained in a serving (see § 437.2(a)(2)).

The claim could not be made. Although the advertised food does contain Vitamin A in an amount greater by 10% or more of the U.S. RDA than the same nutrient is contained in the compared food, the compared food contains three nutrients which are present in amounts greater by 10% or more of the U.S. RDA than the amounts at which the same three nutrients are present in the advertised food. Thus, the percentage of U.S. RDA of Iron in a serving of the compared food is greater by at least 10% than the percentage of Iron in a serving of the advertised food. The same result occurs when the percentages of the U.S. RDA of Niacin and Vitamin C in the compared food are compared to the percentages of the U.S. RDA of those same nutrients in the advertised food.

In making the above determination the advertiser must look at all nutrients present in each food for which there is an

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established U.S. RDA to evaluate whether such a claim can be made. The underlying nutrient comparisons which determine whether a claim may be made under this paragraph, for § 437.4(a) (2) and (3), are between any nutrient in the compared food and the same nutrient in the advertised food.

Section 437.4(a) establishes one additional requirement which is intended to ensure relative nutritional parity between the foods about which a specific nutrient comparison is made. If a serving of the advertised food contains more calories than an equal-sized serving of the compared food, then the compared food may not contain more than two nutrients on a per 100 calorie basis in amounts greater than the amounts at which the same two nutrients are contained in a serving of the advertised food. The theory behind this requirement is that if a serving of the advertised food contains more calories than a comparable serving of the compared food and these calories do not provide an amount of nutrients proportionately equal to or greater than all but a maximum of two nutrients that are contained in a serving of the compared food, then it would be misleading to promote the advertised food for its higher content of one or more nutrients. Since the advertised food contains more calories per serving than the compared food (and is nutritionally inferior in that respect), it is important to ensure that its overall nutrient/calorie balance be comparable to the compared food before a nutrient comparison claim may be made. Here, as in § 437.4(a) (2) of the proposed rule, the comparisons are made between any nutrient in the compared food and the same nutrient in the advertised food.

The following is an example of the way in which a calculation is made using a nutrient-per-100-calorie basis. If a serving of food A (advertised food) contains 300 calories and 51% of the U.S. RDA for Vitamin A and a serving of food B (compared food) contains 200 calories and 40% of the U.S. RDA of Vitamin A, then food A has 17% per 100 calories and hence has a lower nutrient/calorie basis for Vitamin A than does food B which contains 20% per 100 calories. Under the proposed rule, if the nutrient-per-100-calorie calculations for two or more other (and, thus, a total of three or more) vitamins, minerals and/or protein in a serving of food B were greater than such calculation for the same two nutrients in food A, food A would not be able to claim that it had more Vitamin A per serving than a comparable serving of food B.

ISSUES

1. Should nutrient comparison claims under the proposed rule be limited to foods which serve the same purpose in the diet?

2. Should the test for permitting a comparison between the quantity of a specific nutrient in the advertised food and the amount of that nutrient in the compared food be based on an overall comparison between those nutrients contained in the compared food and the same nutrients in the advertised food;

or should the quantities of each nutrient in the compared food be compared with the quantity at which any nutrient is contained in the advertised food? Are there additional or alternative tests of nutritional equivalence which should be made before a nutrient comparison claim may be made?

(b) *Representations that a food is a substitute or replacement for, or as nutritious as, another food.* This provision contains five requirements for making claims that a food is a substitute or replacement for another food or is as nutritious as another food. These requirements mandate virtual nutritional equivalency between two foods before such claims are made, since the likely effect of such claims on consumers is to cause them to replace the compared food in their diet with the advertised food. The prerequisites to the making of such claims are intended to ensure that consumers will not suffer any significant nutritional detriment when they consume foods purchased on the bases of such claims. There are two absolute prerequisites to such a claim:

1. A serving of the advertised food must contain all nutrients present in "measurable amounts" (i.e., 2% of the U.S. RDA) in the compared food in at least the same amounts as they are contained in a serving of the compared food; and

2. If the compared food contains protein, the protein in the advertised food must be of at least the same quality.

If the above-described conditions exist, the identity of the compared food and the comparative caloric content of equal-sized stated servings of the advertised and compared foods must be disclosed.

Further, if the advertised food has a higher fat content than the compared food, that fact and the total fat content must be disclosed.

However, for the purposes of compatibility with the nutrient labeling program, a major exception is made to the provision: If the advertised food is labeled "imitation" in accordance with the Food and Drug Administration's regulations, it may be advertised as such and claimed as a substitute or replacement for the non-imitation product. However, any such advertisement must disclose that the food is not as nutritious as the food for which it is intended to be a substitute or replacement. This disclosure requirement in advertising merely incorporates the nutritional premise upon which FDA's nutrient labeling scheme bases its requirement that the food be designated as "imitation".

ISSUES

1. Is it appropriate to require a serving of the advertised food to contain all the nutrients contained in "measurable amounts" (i.e., 2% of the U.S. RDA) in at least the same amounts as they are contained in a serving of the compared food? If not all nutrients, as to what nutrients should there be parity?

2. Should nutrient comparisons (for purposes of satisfying the first prerequisite of making a claim under § 437.4 (b)) be between nutrients contained not

at 2 percent but at some higher level (e.g., 10% of the U.S. RDA) in a serving of the compared food?

3. Will disclosures of comparative caloric and fat content be meaningful to consumers in the context of these claims or should there be prerequisites to the making of such claims which require that a serving of the advertised food have as many calories as, or fewer calories than, a serving of the compared food, and that a serving of the advertised food have the same fat content as, or a lower fat content than, a serving of the compared food, without any requirement of disclosure?

(c) *Representations that a food is nutritionally superior to another food.* The requirements for making a nutritional superiority claim for a food are the same as those for making a claim of nutritional equivalence outlined for § 437.4(b), supra, except that a serving of the advertised food must contain all nutrients contained in "measurable amounts" (2% of U.S. RDA) in a serving of the compared food in amounts greater by 10% or more of the U.S. RDA than the amounts contained in the compared food. Thus, a generalized claim of nutritional superiority will require superiority at a significant level for each such nutrient present in the compared food in a measurable amount.

ISSUES

1. Is it appropriate to require a serving of the advertised food to contain all the nutrients contained in "measurable amounts" (i.e., 2% of the U.S. RDA) in a serving of the compared food, in amounts greater by 10% or more of the U.S. RDA than the amounts contained in the compared food, before a nutritional superiority claim can be made? If not all nutrients, as to which nutrients should a comparison be made?

2. Should nutrient comparisons (for purposes of satisfying the first prerequisite of making a claim under paragraph (c) (1)) be between nutrients contained not at 2 percent but at some higher level (e.g., 10% of the U.S. RDA) in a serving of the compared food?

3. Will disclosures of comparative caloric and fat content be meaningful to consumers in the context of these claims or should there be prerequisites to the making of claims that a serving of the advertised food have as many calories as, or fewer calories than, a serving of the compared food, and that a serving of the advertised food have the same fat content as, or a lower fat content than, a serving of the compared food, without any requirement of disclosure?

§ 437.5 Nourishment claims.

(a) *Claims that a food is a valuable or significant source of nutrition.* Such claims are not permitted unless a serving of an advertised food contains:

1. At least 4 nutrients, one of which must be protein, in amounts of 10% of the U.S. RDA per 100 calories; and

2. At least one of the nutrients is present in a serving of the advertised food in an amount of at least 10% of the U.S. RDA.

This paragraph is based on the proposition that, because calories are a limiting factor in the diet, a food is "nourishing" only if it provides a reasonable number of nutrients, given the calories supplied by that food. Therefore, a nourishment claim cannot be made for a food unless it provides 4 nutrients, including protein, in nutritionally significant amounts per 100 calories and a serving of the food provides at least one nutrient in a significant amount. (This provision does not apply to claims directed to a specific nutrient contained in a food.) The following is an example of a food that could make a nourishment claim: A serving of food X contains 50 calories and 5% of the U.S. RDA of Protein, Calcium, and Iron and 10% of the U.S. RDA of Vitamin A. Since a serving of the food contains 10% of the U.S. RDA of one nutrient and the food contains 10% per 100 calories of three others, including protein, it may claim that it is "nourishing." If a serving of food X contained 100 calories per serving but the same percentages of nutrients, no general nourishment claim for the food itself could be made, although a representation that it contained "nourishing Vitamin A" would be proper, since such a claim fulfills the requirements of § 437.2(a) (2).

ISSUES

1. Should the prerequisite for making a claim that a food is a valuable or significant source of nutrition be based on the content of 4 nutrients, including protein, in amounts of 10% of the U.S. RDA per 100 calories or should it be required that those or some of those 4 nutrients be present in amounts of 10% of the U.S. RDA per serving of the advertised food? Are there additional or alternative requirements that should be met before such a claim is allowed?

(b) Claims that a food provides all the nutrients necessary for a sound, complete or balanced diet.

(c) Claims that a serving of an advertised food alone provides complete or perfect nutrition.

These provisions collectively prohibit any representations that any food provides all the nutrients required to sustain human life unless competent and reliable scientific tests demonstrate that it constitutes a total diet replacement.

(d) Representations that a food or a serving thereof constitutes a nutritionally adequate meal. This provision prohibits claims that a food constitutes a nutritionally adequate meal unless it complies with any relevant federal regulation which exists or is developed to govern the making of such claims. On June 14, 1974, FDA published proposed regulations governing "formulated meal replacements" and "formulated meal bases" (see 21 CFR 100.8 and 102.21).

§ 437.6 Natural and organic food claims.

During the past several years claims have proliferated depicting food products as "natural" or "organic", or as "naturally grown" or "organically grown". Such claims have frequently stated or implied that the advertised foods possess superior nutritional characteristics. The Commission is seriously

concerned with the ability of consumers to understand these terms which are used in a wide variety of confusing and conflicting contexts. Various ameliorative approaches are possible. The staff of the Commission proposes (see Staff Statement of Fact, Law, and Policy) a prohibition on the use of the terms "natural" or "organic" (as well as "naturally grown" or "organically grown"), allowing the advertisers instead to represent the facts which they believe would otherwise warrant the use of the terms (e.g., that a food product "does not contain any artificial preservatives" or that it "does not contain any artificial fertilizers"). An alternative approach would be the establishment of uniform definitions for the use of the terms "natural" (or "naturally grown") or "organic" (or "organically grown"), if that is possible. For example, a food product might be appropriately advertised as "natural" only if it does not contain any artificial or synthetic ingredients.

ISSUES

1. What, if any, is the proper definition of the term "natural food"? "Naturally grown food"? If any such definition exists for either term, is it generally accepted (among scientists or nutritionists; among consumers) or is there confusion, misunderstanding or disagreement about it?

2. What, if any, is the proper definition of the term "organic food"? "Organically grown food"? If any such definition exists for either term, is it generally accepted (among scientists or nutritionists; among consumers) or is there confusion, misunderstanding or disagreement about it?

3. What empirical evidence, if any, is there of consumer understanding of the terms "natural", "naturally grown", "organic" and "organically grown"? If such evidence exists, does it show a consumer understanding consistent with any generally accepted definitions of those terms?

4. What evidence, if any, is available to demonstrate that so-called "natural" (or "naturally grown") or "organic" (or "organically grown") foods are in any way superior to other foods other than the extent, if any, to which they are superior by reason of the facts enumerated (and allowed to be claimed) in § 437.6 (a) and (b) of the staff proposal on "Natural and Organic Food Claims"?

5. If the terms "natural" (or "naturally grown") and "organic" (or "organically grown") cannot be defined in a manner which will eliminate consumer misunderstanding, should their use in advertising be prohibited?

6. If the terms "natural" or "naturally grown" are to be prohibited in advertising, which, if any, of the following claims should be permitted where truthful:

a. "... does not contain any artificial or synthetic preservatives."

b. "... does not contain any artificial or synthetic flavors."

c. "... does not contain any artificial or synthetic colors."

d. "... does not contain any (other) artificial or synthetic ingredients."

What other claims, if any, should be allowed?

7. If the terms "organic" or "organically grown" are to be prohibited in advertising, which, if any, of the following claims should be permitted where truthful:

a. "... has not been grown with (or subjected to) pesticides (or artificial fertilizers; or artificial conditioners)."

What other claims, if any, should be allowed?

8. If any specific factual claim referred to in issues 6 or 7 is to be permitted in advertising, should any further representation of nutritional superiority based on such claim be allowed?

§ 437.7 Claims for foods intended to be combined with other foods.

Paragraphs (a), (b), and (c) of § 437.7 deal with advertising problems involving food products to which a characterizing ingredient must be added in order to prepare it for consumption. This includes new products called "meat extenders" which have recently appeared on the market.

Paragraph (a) provides that for these foods it must be clearly and conspicuously disclosed that it is necessary for the consumer to add a characterizing ingredient to the product. This will lessen the likelihood of consumers being misled into believing that the advertised food contains everything needed to serve it.

Paragraph (b) allows the affirmative disclosures of nutrient content to be made for a serving of the combination as consumed, but prohibits a representation that the advertised food alone provides all the nutrients which are present in a serving of the combination. Since these foods are always combined when consumed, it is appropriate that the nutrient disclosures reflect the food as served.

To eliminate inflation of the advertised food's nutritional value through the disclosure provided by paragraph (b), paragraph (c) provides that if the food with which the advertised food is combined provides more than 50% of any nutrient named in the advertisement, it must be disclosed that most of that nutrient is provided by the other food.

Paragraph (d) treats a slightly different problem—foods which are frequently but not necessarily combined with other foods as consumed. In this situation, any nutrient claim or disclosure must be based on the advertised food alone. Breakfast cereals are examples of this type of food. Many of them presently provide such nutrient information on the boxes in which they are contained.

ISSUE

1. Should a food which is sometimes but not necessarily combined with another food be allowed to disclose the nutrients present in the combination so long as the nutrients present in the advertised food alone are disclosed with equal prominence? If so, should such additional disclosure be limited to print advertising, or be allowed in other media as well?

§ 437.8 Energy and caloric claims.

(a) *Claims that a food provides "energy" or "food energy".* This provision is intended to prevent consumers from being misled to believe that the terms "energy" or "food energy" mean anything other than calories, or that a claim that a certain food is a good source of "food energy" means that it is nutritious. Thus, each time that an energy claim is made, the proposed rule requires a disclosure of the fact that "energy" or "food energy" is supplied by calories and the number of calories contained in a serving of the advertised food.

(b) *Claims that a food or nutrient provides health, general vigor, sustained energy or alertness, or that energy from calories will produce strength, endurance, intellectual performance, or prevents fatigue.* This provision prohibits claims that a food, nutrient, or calories will alone determine a person's general well-being or vigor, since these traits are influenced by a number of factors including heredity, general physical and emotional status, and environmental stimuli. This paragraph is intended to deal only with claims directed at general or sustained health as opposed to claims of short-term contributions to vigor provided by a food covered by § 437.8(c).

(c) *Claims that a food enhances or contributes to vigor, alertness, energy, strength or endurance.* This provision prohibits claims that a food enhances or contributes to vigor unless it is disclosed that this vigor, etc. is enhanced by and depends, in part, on calories in the food, and the advertisement discloses how many calories are in a stated serving of the food. It is recognized that when a person is temporarily deficient in available calories, as during strenuous physical exercise, eating a food which is a good source of calories may contribute to strength, endurance, etc. Therefore such a claim is permitted if it is made in a proper context and the number of calories provided by a serving is disclosed. The point that such claims must be made in a carefully qualified manner should be particularly noted. Simple compliance with the requirements of this provision would not alone render an energy claim per se fair and nondeceptive.

(d) *Claims that a food or meal contributes to or is useful in regulating or maintaining caloric intake or body weight, or depiction of a food as a "diet" or "low calorie" food.*

This provision prohibits low calorie or diet claims unless the food conforms to applicable regulations of the Food and Drug Administration for foods which are low in calories. Revised regulations are presently being developed by FDA. Subparagraph (2) would require that the number of calories in a stated serving of the advertised food be disclosed. This is designed to allow consumers to judge for themselves how useful the food will be in a program of weight control.

ISSUES

1. Is adequate and proper exercise a sufficiently useful way of altering daily caloric balance as to require the men-

tion of this factor in advertisements for foods claiming to be useful in regulating or maintaining caloric intake or body weight?

2. Should advertisements for foods claiming to be useful in regulating or maintaining caloric intake or body weight be required to disclose, either alone or in addition to the disclosure presented in issue 1 above, that a reduction of total caloric intake should be combined with consumption of the advertised food?

(e) *Diet claims for foods containing artificial sweeteners.* This provision pertains to foods, such as "diet" soft drinks, which contain either only artificial sweeteners or a combination of artificial sweeteners and sugar. It requires disclosure of the number of calories in a stated equal-sized serving of the product with a nutritive sweetener so that the consumer can see how many calories he or she is getting in the food represented as a diet food. In addition, this regulation requires that a disclosure be made if the food does contain nutritive sweeteners so that diabetics who should not consume sugar are aware of the fact.

(f) *Representations that a food is "sugarless".* This provision is designed to prevent representations that a food is "sugarless" or similar representations unless the product in fact contains no sugars, including the sugar alcohols. It would prevent the possibility that diabetics and other persons who are attempting to avoid all forms of sugar are improperly misled.

§ 437.9 Fat, fatty acid and cholesterol content claims.

The Food and Drug Administration's nutrient labeling program strictly regulates the making of label claims regarding the fat, fatty acid and cholesterol content of foods. FDA prohibits any claim linking the consumption of a food to the prevention of coronary disease or to positive effects on existing coronary conditions. It is the Commission's understanding that the intent of the FDA regulations in this area is to eliminate any label representation which, in the absence of medical advice, would tend to confuse or mislead consumers about the relationship between cardiovascular disease and the consumption of foods which contain or do not contain fat, fatty acid, and cholesterol. FDA's regulation embodies the view that a consumer's physician—not the consumer alone—should make the judgment as to what, if any, dietary changes should be made to reduce the risk of heart or artery disease or related conditions. The staff would propose a rule consistent with FDA's provision on this subject (see Staff Statement of Fact, Law, and Policy). The Commission is concerned that this approach when applied to advertising may prevent the making of certain limited claims which are both accurate and beneficial, and the questions raised below are intended to explore whether or not this concern is justified.

ISSUES

1. What claims, if any, concerning food and heart or artery disease or any

attendant conditions or the fat, fatty acid, or cholesterol content of food, which are forbidden by 21 CFR 1.18 to be made in food labeling, should be permitted in advertising? Why should such claims be permitted in advertising but not in labeling? Is any such claim, even if literally true, likely to carry with it any additional implication(s) which would be deceptive or unfair?

2. Is there any claim concerning food and heart or artery disease or any attendant condition which is not forbidden by 21 CFR 1.18 and which should be allowed in food advertising?

§ 437.10 Health or related claims.

Nutrient labeling regulations of the FDA (21 CFR 1.17(d)) prohibit various claims which might distort the nutritive or medical benefits allegedly resulting from the consumption of a labeled food. Staff has proposed rule provisions which would apply FDA labeling prohibitions to advertising. The following questions are designed to elicit comment on the issue of whether, given the prohibitions established by FDA's nutrient labeling rule, any departure from these prohibitions is appropriate in the case of advertising.

Staff would further prohibit use of the general term "health food" on grounds that the term lacks definition and, therefore, is confusing and may deceive consumers into believing that a given food will, by itself, provide them with good health. Staff's proposal, however, would permit the making of specific positive nutrition claims about a food so long as the general requirements of the other provisions in Subpart B of the proposed rule are satisfied.

ISSUES

1. What claims, if any, concerning the nutritive or medical benefits allegedly resulting from the consumption of foods which are forbidden to be made in food labeling by 21 CFR 1.17(d) should be permitted in advertising? Why should such claims be permitted in advertising but not in labeling? Is any such claim, even if literally true, likely to carry with it any additional implication(s) which would be deceptive or unfair?

2. What, if any, is the proper definition of the term "health food"? If such a definition exists, is it generally accepted (among scientists or nutritionists; among consumers) or is there confusion, misunderstanding or disagreement about it?

3. What empirical evidence, if any, is there of consumer understanding of the term "health food"? If such evidence exists, does it show a consumer understanding consistent with any generally accepted definitions of those terms?

4. If the term "health food" cannot be defined in a manner which will eliminate consumer misunderstanding, should its use in advertising be prohibited?

EFFECTIVE DATE

180 days are allowed after final promulgation of the rule for all advertisers to bring their advertisements fully into compliance with the provisions of the rule.

STAFF STATEMENT AND AFFIRMATIVE DISCLOSURE

In addition to soliciting comment on the proposed rule, the Commission wishes to solicit comment on the Staff Statement of Fact, Law, and Policy as it relates to affirmative disclosure in nutrition advertising. All persons and organizations submitting comments and testimony concerning the staff statement are urged to address themselves to the issues set forth below and to propose specific disclosure schemes that would accomplish the purposes of the staff proposal together with detailed reasons why those specific proposals would be likely to be understood and utilized by a significant number of consumers. Each such proposal should also take into consideration the goal of minimizing interference with the basic format and design of food advertising.

The Commission views this portion of the proceeding as an opportunity for all interested persons to assist the Commission in an effort to evaluate the staff statement calling for industrywide disclosure requirements that will inform consumers of the nutritional worth of advertised foods but will not unduly impede the advertiser's ability to promote a product in any truthful and fair way it chooses.

ISSUES

1. What evidence, including opinion, is there that bears upon the extent to which consumers want nutrition information in advertising, the extent to which such information can be understood and used by consumers, and the need for such information?
2. What is the relation between nutrition information in advertising and nutrition information in labeling? Should advertisements for foods which carry nutrient labels (either labels required by government regulation or voluntarily-placed labels) be required to include nutrient disclosures? Should such disclosures be limited to these foods?
3. What nutrition information should be disclosed in advertising?
4. Should the presence of specific nutrients be disclosed?
5. What nutrients should be disclosed? Should the percentage of U.S. RDA at which each such nutrient is present in a serving of the advertised food be disclosed?
6. Should nutrient disclosures be limited to nutrients for which a U.S. RDA

has been established? If not, what other nutrients should be disclosed?

7. Should nutrient disclosures be prohibited unless the nutrient in question is contained in a serving of the advertised food at or above a certain percentage of the U.S. RDA? If so, what percentage?

8. Should the number of calories in a serving of the advertised food be disclosed?

9. Should the serving size of the advertised food be disclosed?

10. Should any other nutrition information or ingredient information concerning the advertised food be disclosed?

11. Should the required nutrition disclosure be a reproduction of the required portion of the nutrient label? Should this always be allowed as an alternative disclosure?

12. Should the disclosures in television advertisements be required in the audio and/or video portions of the commercials?

13. Should minimum time periods be set for the audio and/or video portions of nutrition disclosures in television advertisements? If so, what should they be?

14. Should the required disclosures be different for foods without nutrient labels than for foods with nutrient labels? If so, how should they differ?

15. Should raw agricultural commodities be exempted from nutrition information disclosures? If so, why?

16. If specific nutrition information disclosure is not required, should a disclosure such as "For nutrition information, see the food label" be required for foods with nutrient labels? Would such a disclosure tend to imply that the food is of significant nutritional worth? What would be the likely impact of such a disclosure on consumers in motivating them to use nutrient labels?

17. Should advertisements for foods which do not contain any nutrients in an amount in excess of some specified percentage of the RDA be required to disclose that fact?

18. Can foods be ranked according to overall nutritional value, and could such rankings be communicated in advertising in lieu of specific information on the identities and amounts of nutrients?

All interested persons, including the consuming public, are hereby notified that they may file written data, views or arguments concerning the proposed rule and the subjects and issues set forth

in the Analysis and Statement of Issues by Section thereto by submitting twenty (20) copies thereof to William D. Dixon, Special Assistant for Rulemaking, Federal Trade Commission, Washington, D.C. 20580, not later than February 5, 1975.

All interested persons will also be given notice of an opportunity to orally present data, views, or arguments with respect to the proposed rule and the subjects and issues set forth in the Analysis and Statement of Issues by Section thereto at a public hearing to be held at a time and place to be announced at a later date and published in the **FEDERAL REGISTER**.

Each person desiring to orally present views at the later specified hearing will be required to inform the Special Assistant Director for Rulemaking in writing before a date which will be announced later (in advance of the hearing) and published in the **FEDERAL REGISTER**, stating the estimated time desired for an oral presentation.

Reasonable limitations upon the length of time allotted to any person will be imposed. In addition, each person desiring to deliver a prepared statement at the hearing (date and place to be announced) will be required to file twenty (20) copies of such statement with the Special Assistant Director for Rulemaking before a date which will be announced later (in advance of the hearing) and published in the **FEDERAL REGISTER**.

The data, views, or arguments presented with respect to the above-designated topics will be available for examination by interested persons in Room 130 of the Division of Legal and Public Records, Federal Trade Commission, Washington, D.C., and will be considered by the Commission in the establishment of a final Trade Regulation Rule.

All persons, firms, corporations or others engaged in food advertising in commerce, as "commerce" is defined in the Federal Trade Commission Act, may be subject to the requirements of any Trade Regulation Rule promulgated in the course of this proceeding.

Issued: November 7, 1974.

By the Commission.

[SEAL]

CHARLES A. TOBIN,
Secretary.

[FR Doc. 74-26140 Filed 11-8-74; 8:45 am]

FEDERAL TRADE COMMISSION FOOD ADVERTISING

Staff Statement of Fact, Law and Policy in Support of the Proposed Rule and in Support of Affirmative Disclosures in Food Advertising

This is a staff document which has not been adopted by the Commission.

I. INTRODUCTION

By Message of May 6, 1969, the President of the United States reported to the Congress that

"... in the past few years we have awakened to the distressing fact that despite our material abundance and agricultural wealth, many Americans suffer from malnutrition. Precise factual descriptions of its extent are not presently available, but there can be no doubt that hunger and malnutrition exist in America, and that some millions may be affected."

The President declared his intention to convene a White House Conference on food and nutrition. Thereafter, on June 11, 1969, work on the Conference began. In the words of the letter transmitting the Conference Report to the President:

A great deal of preliminary work was done during the summer and fall of 1969 by 26 panels and by eight task forces. The panels were made up of academic, medical, industry, and agriculture experts, as well as citizens chosen because of their particular concern rather than expertise. The task forces represented vast segments of our population such as social action groups, women's organizations, industrial and consumer interests, professional organizations, and religious denominations. All 800 or so participants in the preparatory work were highly conscious of their responsibility and spent considerable time in work and travel to insure that the 2,200 additional members of the Conference be provided with thoughtful and detailed provisional recommendations and background material.

"... [T]he membership of the Conference—and of each discussion group—was as broad as possible. University professors and students, physicians, old and young, industry leaders and technicians, representatives of consumer organizations, members of all main religious denominations and of minority organizations, members of women's organizations with membership totaling over 60 million women, labor leaders, representatives of health organizations, agricultural and trade organizations, social action groups from all economic levels ranging from the National Association of Manufacturers to various organizations dealing with the very poor—and last but not least, over 400 of the very poor themselves: black, Mexican-American, Puerto Ricans, white, Indians, Alaskan natives, inhabitants of the Pacific Trust territories, and of our Caribbean dependencies and migrant laborers were brought together to discuss the recommendations submitted to them by the panels and the task forces."

Pertinent to our discussion here, the Conference found that:

"White House Conference on Food, Nutrition and Health, Final Report I (1968). Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402. (Hereinafter cited as "White House Conference Report.")

"White House Conference Report, supra note 1, at 13.

Current problems are due—not to any shortage of nutrients—but rather to the following circumstances among others:

"... A substantial and serious lack of nutritional knowledge and/or motivation to use it on the part of many people including some members of the medical profession."

The section of the Conference Report prepared by the Panel on Popular Education underscored the causal link between the lack of nutrition information and malnutrition:

The panelists feel that one basic right of individuals in our society is the right to proper food. But in order to exercise this right effectively, every citizen must know enough about foods and nutrition to choose for himself those foods which will supply his nutritional needs.

It is clear that a great many of our citizens lack this necessary knowledge—both rich and poor, educated and uneducated—despite the great range and influence of our educational system, and our communications media. In fact, the gaps in our public knowledge about nutrition, along with actual misinformation carried by some media, are contributing seriously to the problem of hunger and malnutrition in the United States."

The portion of the Conference Report prepared by the subpanel on deception and misinformation elaborated on the panel's finding that consumers are seriously injured by misinformation as well as by lack of information. Sharply criticizing both oppressive marketing techniques and the Government's efforts to regulate those techniques, the panel reported that:

Many travesties cheat the public of enormous sums of money, and of good health as well. Yet the American people falsely believe they are well protected, both by Government and by the ethics of commerce.

In many cases, labels, advertising and packaging imply a quality, quantity or content that is false. Here those who cannot afford poor food choices are especially exploited. The poor, in particular the old, the ill and the least educated, are "... lured by advertising that suggests falsely that certain cheap, widely sold products, because they contain a few added vitamins or minerals, can replace usual foods or even whole meals."

The subpanel then detailed at length the inadequacy of past law enforcement efforts to protect consumers and called upon the responsible agencies to display new vigor and imagination:

It is strongly urged that the Federal Government constantly search for law and procedures that have not traditionally been thought of as weapons in the war against deception and misinformation, or which lately have been overlooked to some extent."

The proposed rule on food advertising, together with its supporting documents and this staff statement, is a response to the Conference's call for action to remedy deception in food advertising. It is also a response to developments since

the Conference which have emphasized the public interest in remedying deception and unfairness in food advertising. These developments are considered in some detail below.

II. THE MATERIALITY OF NUTRITION INFORMATION

Among the law violations to which the staff believes a trade regulation rule on nutrition advertising should be addressed are deceptive and unfair omissions from advertising of material information, omissions that violate sections 5 and 12, as defined by section 15, of the Federal Trade Commission Act."

While an explicit discussion of the materiality of a violation of the Federal Trade Commission Act is not ordinarily necessary to make out a case under section 5 of the Act¹ such a discussion is useful in the analysis of a violation arising from the non-disclosure of information. Accordingly, this Statement will first establish the materiality of nutrition information before turning to the specific analyses of the alleged law violations.

The materiality of information arises from the need or the preference of consumers for the information and from their ability to apply it in their purchase or use decisions. Data on the extent of malnutrition, and on the risk of malnutrition, in America speak in varying degrees to each of these elements. Accordingly, discussion of the materiality of nutrition information should begin with a general consideration of that data.

There is a great deal of evidence indicating the existence of malnutrition problems in America. The concern voiced by the President and the White House Conference have already been cited in illustration of this point. From among many sources, further evidence of the problem of American malnutrition can be found in two comprehensive studies, the Ten-State Nutrition Survey² and the First Health and Nutrition Examination Survey (HANES)³, which were undertaken precisely to define the scope of the malnutrition problem.

The Ten-State Survey was the first comprehensive attempt ever undertaken to assess the nutritional status of the American people.⁴ The Survey was created by the Department of Health, Education and Welfare following the express direction of the Congress that the prevalence, magnitude, and distribu-

¹ 15 U.S.C. Sections 45, 52, 55 (1970).

² See, e.g., "Developments in the Law-Deceptive Advertising," 80 Harv. L. Rev. 1056-1057 (1967).

³ U.S. Department of Health, Education, and Welfare, Health Services and Mental Health Administration, Ten-State Nutrition Survey 1968-1970. DHEW Publication No. (HSM) 72-8134. (Hereinafter cited as "Ten-State Survey.")

⁴ U.S. Department of Health, Education, and Welfare, Public Health Service, Preliminary Findings of the First Health and Nutrition Examination Survey, United States, 1971-1972. DHEW Publication No. (HRA) 74-1219-1. (Hereinafter cited as "HANES.")

⁵ Ten-State Survey, supra note 3, at I-9.

⁶ White House Conference Report, supra note 1, at 102.

⁷ White House Conference Report, supra note 1, at 179.

⁸ White House Conference Report, supra note 1, at 190.

⁹ White House Conference Report, supra note 1, at 194.

tion of malnutrition and related health problems within the United States be identified. To that end, demographic, dietary, clinical, anthropometric, dental, and biochemical data were gathered from primarily low income families in ten target states¹² plus New York City.

In the words of the survey report:

The results of the Ten-State Nutrition Survey indicated that a significant proportion of the population surveyed was malnourished or was at high risk of developing nutritional problems.¹³

Among the specific findings of the survey were evidence of general under-nutrition among the elderly of every income and ethnic group,¹⁴ widespread deficiencies of riboflavin among blacks and the young of every ethnic group,¹⁵ subnormal hemoglobin for every age and ethnic group¹⁶ and marginal protein nutrition for a large proportion of pregnant and nursing women, a problem all the more tragic for its adverse impact on successful pregnancy and infant mortality.¹⁷

Striking data, illustrative of the survey's findings can be cited. In the five low income ratio states, i.e., those in which more than half of the families surveyed were near or below the poverty line hemoglobin levels, which are in part a function of iron intake, were judged low or deficient in 15.6 percent of whites surveyed, 37.4 percent of blacks, and 20.6 percent of Spanish Americans. When broken down by age groups, the data are even more disturbing: For example, for children under 2 years old, 19.2 percent of the white, 35.4 percent of the black, and 12.6 percent of the Spanish American had subnormal levels. If one turns to males over age 59, the percentages are 26.7 for whites, 65.2 for blacks, and 45.1 for Spanish Americans.¹⁸ Nor were these deficiencies limited to states with low-income survey populations: In the five higher income ratio states surveyed, i.e. those in which more than half the families surveyed were well above the poverty line, subnormal hemoglobin was still found in 9.3 percent of surveyed whites, 26.9 percent of blacks and 17.1 percent of Spanish Americans.¹⁹

Similar data were recorded for plasma vitamin A levels, which are a measure of the vitamin's long-term dietary intake. In the low-income ratio states surveyed 5.7 percent of examined whites, 9.0 percent of blacks, and 33.1 percent of Spanish Americans had subnormal levels.²⁰ For the high-income ratio states the figures were 7.5 percent of whites, 6.1 percent of blacks, and 2.3 percent of Spanish

Americans.²¹ And again, the age group data are striking: for example among low-income ratio state children age 2 to 5, 11.3 percent of whites, 21.2 percent of blacks, and 51.7 percent of Spanish Americans were low or deficient in plasma vitamin A.²²

In the words of the survey report,

The data indicate that vitamin A nutriture is a major public health concern among Spanish-Americans in the low-income-ratio states. The relatively high prevalence of low vitamin A values among young persons of all races suggests that these age groups should undergo continuous surveillance of vitamin A status.²³

In addition to biochemical measurements, dietary intake data, derived from survey respondents' reports of the foods they consume, were also employed by the Ten-State Survey as indicators of the adequacy of the survey populations' diets. Those data further support the conclusion that Americans have widespread malnutrition problems. For example, backing up the biochemical data indicating inadequate iron in the surveyed populations' diets is dietary intake data indicating that in the low-income ratio states surveyed, 88.8 percent of white, 93.5 percent of black and 76.2 percent of Spanish American females age 12 to 14 had dietary iron intakes below standard.²⁴ Figures on vitamin A intake likewise indicated inadequacies for substantial numbers in all three ethnic groups.²⁵ Again, as with the biochemical data cited above, this illustrative data is but a sampling of the Ten-State findings.

The second major survey substantiating and illustrating the problems of malnutrition in America is the HANES. A project of the National Center for Health Statistics, Department of Health, Education, and Welfare, the HANES was designed to comprehensively measure the nutritional status of the United States population and to monitor changes in that status over time.²⁶

Only the preliminary findings of the first HANES are available, but they further substantiate the disturbing findings of the White House Conference and the Ten-State Survey.

For example, dietary intake data indicate that over 90 percent of all children age 1-5 and females age 18-44 have diets deficient in iron. Likewise, the data also show for low-income females age 18-44 that 73.54 percent of the whites and 64.42 percent of the blacks have substandard vitamin A intakes, while for high income whites and blacks alike more than 50 percent age 60 and over showed substandard vitamin A intakes.²⁷

The preliminary report of the HANES biochemical data, as opposed to dietary intake data, is more optimistic about the state of the survey population's health, but it too confirms the prevalence of iron deficiency, and finds, for example, 9.08 percent of low-income black children

and 10.34 percent of high income black children deficient in vitamin A²⁸ and 13.17 percent of whites age 60 and over²⁹ and 13.67 percent of white females age 18-44 notably low in protein, among those persons surveyed who had income above the poverty level.³⁰

Also worth noting are data collected by a group of researchers who reviewed all studies published between 1950 and 1963 which contained dietary intake, biochemical or clinical evidence related to vitamin and mineral nutrition.³¹ Again significant data emerged involving malnutrition. For example, biochemical tests found that 35 percent of individuals studied were "below acceptable" levels for riboflavin, 12 percent were "low", and 25 percent were "deficient". For vitamin A the figures were 24 percent, 15 percent, and 9 percent; for vitamin C, 37 percent, 21 percent, and 18 percent.³²

Finally, trend data on the composition of American diets offers further cause for concern. The U.S. Department of Agriculture conducted a survey in the spring of 1965 on a nationwide sample of 7,500 households selected to represent housekeeping households in each of the four census regions.³³ The survey found that 50 percent of the households surveyed in 1965 had diets that were considered "good"—that is, they met the Recommended Daily Allowance for 7 nutrients. That figure was down from 60 percent in 1955. About 21 percent of the households in 1965 had diets which were rated "poor"—that is, supplied less than 2/3 of the Recommended Daily Allowance for one or more nutrients. That figure was up from 15 percent in 1955.³⁴ The report indicated that the nutrients most often in short supply were calcium, vitamin A and vitamin C. These nutrient shortages were associated with the use of less-than-recommended amounts of milk, milk products, vegetables, and fruit. Consumption of these foods declined from 1955 to 1965, while the consumption of soft drinks, punches, and prepared desserts rose sharply.³⁵

Although a greater percentage of households had "good" diets at each successively higher level of income, high income alone was no assurance of good diets; of those households with income of \$10,000 or more, 9 percent had poor diets, while 36 percent of those households with income under \$3,000 had poor diets.³⁶

These statistics provided by the USDA surveys most likely understate the ex-

¹² California, Kentucky, Louisiana, Massachusetts, Michigan, New York, South Carolina, Texas, Washington, and West Virginia.

¹³ Ten-State Survey, "Highlights", supra note 9, at 8.

¹⁴ Ten-State Survey, "Highlights", supra note 9, at 10.

¹⁵ Ten-State Survey, "Highlights", supra note 9, at 12.

¹⁶ Ten-State Survey, "Highlights", supra note 9, at 11.

¹⁷ Ten-State Survey, "Highlights", supra note 9, at 12.

¹⁸ Ten-State Survey, supra note 9, at IV-10.

¹⁹ Ten-State Survey, supra note 9, at IV-13.

²⁰ Ten-State Survey, supra note 9, at IV-141.

²¹ Ten-State Survey, supra note 9, at IV-144.

²² Ten-State Survey, supra note 9, at IV-141.

²³ Ten-State Survey, supra note 9, at IV-137.

²⁴ Ten-State Survey, supra note 9, at V-172.

²⁵ Ten-State Survey, supra note 9, at V-156.

²⁶ 157, 201, 202, 219, 220.

²⁷ HANES, supra note 10, at 1.

²⁸ HANES, supra note 10, at 10.

²⁹ HANES, supra note 10, at 99.

³⁰ HANES, supra note 10, at 161.

³¹ HANES, supra note 10, at 159.

³² Thomas R. A. Davis, Stanley N. Gershoff and Dean F. Gamble, "Review of Studies of Vitamin and Mineral Nutrition in the United States (1950-1968)" *Journal of Nutrition Education*, Volume 1, Number 2, Supplement 1, (Fall 1969).

³³ Id., at 53. (Percentages cited are estimated from bar graphs.)

³⁴ U.S. Department of Agriculture, Agricultural Research Service, *Dietary Levels of Households in the United States, Spring 1965*, U.S. Government Printing Office, Washington, D.C. 20402.

³⁵ Id., at 1.

³⁶ Id., at 2-3, 7.

³⁷ Id., at 5.

tent of nutritional problems in the households surveyed, since the data refer to the diets of the households rather than individuals, and, therefore, the nutrient intakes of those family members with the best diets are averaged with the intakes of those family members with the worst diets. This averaging process inevitably obscures instances of nutritional deficiencies.

One final issue related to malnutrition which is of concern to nutritionists and public health officials alike is the extent of obesity in the United States. The Ten-State Survey provides some relevant data on this issue. Over one-fifth of the white male population age 14 through 60 with income greater than 150 percent of the poverty level were diagnosed as being obese. Of the white females in the same age and income group, the percentage of individuals considered to be obese ranged from 9.3 to 41.5 percent. The percentages for blacks were also considerable. Obesity is definitely a problem for all age groups in this income category.¹⁷

In addition to these substantial indications of nutritional inadequacies involving large numbers of consumers, two other aspects of food and nutrition give further emphasis to the critical importance of individual decisions concerning the choice and consumption of foods, thereby further emphasizing that consumers need nutrition information.

First, some essential human nutrients must be consumed in their proper amounts almost daily in order to prevent deficiencies. Fat soluble nutrients, such as vitamin A, can be stored in the body in times of nutrient plenty and can be mobilized in times of nutrient poverty. But water soluble nutrients, which include the majority of vitamins, and among which is vitamin C, are not generally stored in the body for any great length of time. Thus, unless each day's diet, by chance or by intent, is adequate in its content of water soluble nutrients, a risk of deficiency may be present.¹⁸

The second consideration illustrative of the substantial injury which can attend improper food decisions—and, therefore, of the need for nutrition information—concerns the cost of food. Findings by the Federal Trade Commission made in 1971 and based on earlier data established that food costs are both high and sharply regressive, imposing the heaviest percentage burden on the poorest of families. The Commission found that 17 percent of the average family budget went to food and that for families with a disposable family income of \$3,000 a year or less, the figure rose to 40%.¹⁹

In an era of rising food costs the impact of food purchases on the family budget is now of even greater concern. This concern can be expressed in two

ways: First, the data on malnutrition taken with the data on food cost illustrate how important it is that very limited family financial resources be carefully spent so as to maximize the nutritional value of food purchases. Secondly, the data are a basis for concern that even families that are adequately nourished may be paying too high a price for their nourishment. For as discussed below, there is reason to believe that consumers may seek satisfaction of their nutritional needs from high cost (and in this sense, inefficient) sources of nutrients. To the extent, then, that from ignorance consumers are spending more than they need on food, they may be suffering serious economic injury. Further, to the extent that ill-informed expenditures on food are made at the expense of expenditures on other means of protecting the family's health, such as medical and dental care, then consumers' physical health is being injured as well. These considerations emphasize the importance to the well being of consumers of food purchase decisions which on a day-to-day basis are nutritionally accurate and therefore economically efficient.

A variety of data indicate that a significant portion of the malnutrition problem just discussed in large part arise from consumers' lack of awareness of the health significance of food choices and of the importance of nutrition and lack of information about the nutritive value of foods they buy.

As noted earlier, the White House Conference Report repeatedly attributes malnutrition not to an overall shortage of available nutrients but rather to, among other reasons, a lack of nutrition knowledge on the part of consumers and actual misinformation disseminated in advertising and other communications media.

Likewise, there should be recalled here the evidence presented by the 1963 USDA survey that changing patterns of food consumption are apparently leading to a deterioration of the American diet. While other factors may, in part, be at work, such changes are fairly attributable, in part, to decisions made by consumers who are unaware of the impact of their changing patterns of food consumption on the adequacy of their diets.

The Ten-State Survey, discussed above, lends at least inferential support to the proposition that lack of nutrition knowledge is contributing to current malnutrition and directly asserts that consumers are paying substantially more than is necessary to obtain needed nutrients:

There was evidence that many persons made poor food choices that led to inadequate diets and to poor use of the money available for food. In particular, many households seldom used foods rich in vitamin A. Also, there was a heavy emphasis on meat in many diets, rather than use of less expensive but excellent protein sources such as fish and poultry, or legumes and nuts.²⁰

It is reasonable to assume—particularly since many of the inadequate diets were found in low and moderate income

households—that the poor food choices noted in the Ten-State Survey were often due to a lack of nutrition information and were not exclusively due to other factors.

The premise that consumers need nutrition information is further illustrated by findings of the Commissioner of the Food and Drug Administration. In the preamble to the proposal of the nutrient labeling program, the Commissioner made plain his determination that,

The increasing number of processed and formulated foods makes it difficult for consumers to identify the nutritional qualities of the products they purchase.²¹

Thereafter, the Commissioner spoke further on the matter of remedying malnutrition. Addressing the American Association for the Advancement of Science, the Commissioner listed in order of their priority to FDA the six basic hazards associated with foods. First on his list was food borne disease, including botulism, salmonella, and the mycotoxins. He then turned to his next concern:

In terms of importance, the second group of food hazards is malnutrition. While the potential for fatal consequences may be remote in the United States, nevertheless the incidence of nutritional deficiencies in the United States is provable and numbers in the millions. And these millions are not counted among the poor alone. It is a problem crossing all social and economic boundaries, often because of our national penchant for fads.

The solution, as we see it, will come through individual consumers making better choices based on better information about the nutritional values available in the foods they buy.²²

The need of consumers for nutrition information can thus be seen in the evidence of malnutrition, of unnecessary expenditures in instances where needed nutrients are being obtained, and of the lack of information contributing to malnutrition. The materiality of nutrition information can also be found in the evidence that consumers are capable of using nutrition information, and do express a desire to receive it.

Studies bearing on these issues have been reviewed by the Food and Drug Administration, and a summary of the studies' results, demonstrating that consumers can and do use nutrition information, has been published by the Commissioner as part of his proposal of the nutrient labeling program.

The studies provide substantial support for the conclusion that consumers are competent users of nutrition information. The proposed Rule to which this Statement pertains requires the disclosure of nutrition information in advertising. It is recognized that these studies involved information provided in a label, catalog, or survey questionnaire, and that a requirement for nutrition information in other media, particularly broadcast media, raises questions not

¹⁷ Ten-State Survey, *supra* note 9, at III-45. Diagnoses of obesity were made by measuring the thickness of fat at the back of the upper arm.

¹⁸ HANES, *supra* note 10, at 3-4.

¹⁹ Statement of Basis and Purpose, Trade Regulation Rule for Retail Food Store Advertising and Marketing Practices, 16 (1971) 36 Fed. Reg. 8777, §180.

²⁰ Ten-State Survey, "Highlights", *supra* note 9, at 10.

²¹ 37 FR 6493 (1972).

²² Address by FDA Commissioner Schmidt, "The Role of the FDA in Food Safety", AAAS Symposium on Food Safety and the Organic Food Myth, Feb. 25, 1974, San Francisco, California.

fully answered by these studies. The studies do show, however, the understandability of nutrition information, even if they do not fully establish the ability to communicate the information in all other media. Thus, they do further establish the materiality of nutrition information. The specific propriety of this information being required to appear in advertising disclosures will be discussed subsequently in this Statement.

The first study, reported by the trade magazine *Chain Store Age* in 1970, exposed consumers to a selection of products, some of which fully disclosed their nutrient and calorie content. The study found slight but perceptible shifts in consumer preferences toward the brands with full disclosure labels, and in some cases, shifts of over 10% occurred.³⁷

Following this study, the Food and Drug Administration contracted with the Consumer Research Institute to research consumer understanding and use of nutrition labeling. CRI then engaged in a two-phase test. The first phase used a panel of 950 educated middle-class Connecticut and Georgia households who purchased their groceries from a catalog. The conclusions relevant to this discussion reached by CRI were:

1. Nutrient information was used by the consumers observed in this study. This is demonstrated by the fact that their purchase patterns changed after the introduction of nutrient labeling.
2. In situations where a product or brand has a real nutritional advantage over its competitors, there was a major change in that product's share of the market.
3. The consumers' attitudes toward nutrition were found to be rather high before the introduction of nutrition labeling. The changes in attitude were positive but small, since the consumers in the test panel already had very positive attitudes about nutrition.
4. There was a considerable increase in the consumers' knowledge of nutrition, especially in their awareness of vitamins and minerals.³⁸

In the second phase of the CRI study, mailed questionnaires and personal interviews were employed to assess the abilities of a national sample and of a low income sample in dealing with nutrition information presented in varying formats. Three formats were used: One format employed percentages of the Recommended Dietary Allowance at which nutrients were present in the food; the next employed adjectival descriptions of foods' nutrient contents; and the third employed representations of foods' contents by pictorially expressed units.

No matter which format was employed, nearly 80 percent of the national sample could successfully employ the nutrition information to pick the more nutritious food from among the test foods presented. For the low income sample responding to a questionnaire, about 70 percent correctly selected the more nutritious food when using the percentage format and 66 percent were still able to deal correctly with adjectival information. When 600 low income con-

sumers were personally interviewed (and, hence, as the survey recognized, presumably better motivated to make their decisions carefully), 90 percent could make correct product choices using any of the three formats.³⁹

Tests were also conducted with the cooperation of a number of food chain stores with two of the tests being evaluated for the Food and Drug Administration by Cornell University. A preliminary test in the evaluation program of a random sample of chain store customers before the labeling experiment began found 70 percent able to use the information correctly in selecting more nutritious foods. Twenty weeks later, after most consumers had presumably acquired some experience in working with the stores' new nutrient labeling, 80 percent of tested consumers were able to deal with the information correctly.⁴⁰

The Commissioner of Food and Drugs found:

The information provided in the various labeling formats was used by consumers. The questionnaire studies indicated that consumers, including those with low incomes and with less than a high school education, were able to understand and use nutrition labeling.⁴¹

Since malnutrition problems are so widespread, and since consumers have the facility to use nutrition information, it is not surprising that consumers explicitly express their desire to receive such information. Consumer representatives, nutrition educators, and nutritionists have addressed the Federal Trade Commission, calling for the provision of nutrition information in advertising, and the Commissioner of the Food and Drug Administration has noted the many requests by consumer groups that such information be made available in food labeling.⁴² The chain store tests just noted found similar preferences expressed directly by consumers. In one chain store test, the majority of consumers asked that the store's nutrition labeling program be continued. In a second store's test, only three consumers out of several hundred responding opposed nutrition labeling, and they only because they feared it would lead to higher food prices.⁴³

The CRI study also measured consumer preferences. Surveyed homemakers were asked what most concerned them in the daily care of their families: that they washed and bathed regularly; brushed their teeth; ate proper foods; or got to school and work on time. Prior to their introduction to the experimental labeling program, 74.4 percent identified proper foods as their first concern, and after experience with the information disclosures, the percentage rose to 78.8.⁴⁴ Finally, and most strikingly, in

³⁷ Id., at 6495.

³⁸ Id., at 6495-6498.

³⁹ Id., at 6496.

⁴⁰ Id., at 6494.

⁴¹ Id., at 6495.

⁴² Raymond C. Stokes, *Selected Federal Interim Report Of The First Two Phases Of The CRI/FDA Nutritional Labeling Research Program* 30 (1972). Consumer Research Institute, Inc., Washington, D.C. 20006.

the Cornell University evaluation of the early chain store experiments, 97.6 percent of consumers surveyed agreed that it was a consumer's right to have nutrition information on food products.⁴⁵

The simple fact that information may bear only on the exercise of personal preferences of a portion of the purchasing public for, say, lubricants refined from virgin crude oil, is sufficient cause to find that information material.⁴⁶ Thus the very fact that consumers desire nutrition information and may weigh it in making purchase and use decisions is sufficient to establish that information's materiality. The Commission, however, has substantial additional grounds for acting here. Since many consumers face substantial nutrition problems, either because they are malnourished or are at risk of malnourishment, and since consumers not only want nutrition information but can use nutrition information and use it with increasing accuracy even after a short period of practical experience, it is evident that the materiality of nutrition information is established, and, moreover, its provision to consumers as a remedy for deceptive and unfair advertising is very much in the public interest.⁴⁷

III. THE FAILURE TO DISCLOSE NUTRITION INFORMATION IN ADVERTISING IS DECEPTIVE

It is well established by case law that deception actionable under section 5 of the Federal Trade Commission Act⁴⁸ can arise from the silence of the advertiser as well as from his affirmative representations.⁴⁹ Furthermore, in the case of food, section 15 of the Federal Trade Commission Act explicitly establishes as a violation of law the omission of facts material in light of affirmative claims made for the food or in the light of the consequences of use of the food:

The term "false advertisement" means an advertisement, other than labeling, which is misleading in a material respect; and in de-

⁴⁵ 37 FR 6496 (1972).

⁴⁶ *Kerran v. F.T.C.*, 265 F.2d 245, 248, (10th Cir. 1959), cert. denied, sub nom. *Double Eagle Refining Co. v. F.T.C.* 361 U.S. 818 (1959) ("But the public is entitled to know the facts with respect to lubricating oil sold by the petitioners being produced from previously used oil and then make its own choice with respect to purchasing such oil or oil produced from virgin crude; even though the choice is predicated at least in part upon ill-founded sentiment, belief, or caprice.")

⁴⁷ Data on how nutrition information affects use, as distinguished from purchase, decisions is not presently available. There is, however, data showing that interest in advertising for a product may actually increase after purchase of the product. Since daily intake of many vitamins is advisable, not only purchase, but also daily use decisions, as, for example, in selecting several foods to serve as a meal, are of very great consequence to the adequacy of each day's total diet. Thus, information bearing on those decisions if contained in advertising can come to the attention of a consumer at a time when critical, daily use decisions concerning the already purchased food are being made.

⁴⁸ 15 U.S.C. 45 (1970).

⁴⁹ See, e.g., *Fisher & DeRitis*, 40 F.T.C. 77 (1952); *Stupell Enterprises, Inc.* 67 F.T.C. 173 (1965); *Bantam Books, Inc. v. F.T.C.*, 378 F.2d 680 (2nd Cir. 1960), cert. denied, 364 U.S. 819 (1960).

³⁷ 37 FR 6494 (1972).

³⁸ Id., at 6496.

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termining whether any advertisement is misleading, there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, sound, or any combination thereof, but also the extent to which the advertisement fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual."

The advertiser need not have taken any affirmative action to create consumer misbeliefs: A violation of law is established if the advertiser is silent about a material fact concerning which consumers may make erroneous assumptions."

Likewise, it is sufficient that an advertisement has a tendency or capacity to deceive: actual deception need not be shown." Thus, in the case of deception by silence, the misbelief need not always be at the forefront of the consumer's thinking at the time of purchase; rather, a violation may be made out even if consumers' erroneous assumptions are unfocused or inchoate."

Cases finding deception by silence have ranged from those where consumers might incur minor economic injury" or the frustration of a mere preference that lacked any apparent rational basis in fact" to where physical safety or life

was endangered."

In determining whether there exists a capacity to deceive, the Commission is to view the representation through the eyes of the general public.

... that vast multitude which includes the ignorant, the unthinking and the credulous, who, in making purchases, do not stop to analyze but too often are governed by appearances and general impressions"

and not through those of a "reasonable man" who carefully analyzes the claims made." Likewise, in assessing the legality of an advertisement, it has been held that if the advertisement is capable of two meanings, one of which is false, then the advertisement is deceptive."

Traditionally, the representations or omissions with which the Commission has been concerned have been those which might deceive consumers into the purchase of products or services; however, several recent trade regulation rules find actionable deception based on a capacity to deceive those who have already purchased goods and services as well as prospective purchasers."

There have been set out the basic standards used in applying sections 5 and 12, as defined by section 15, of the Act, it should next be noted that in the case of food advertising, these standards are applicable with particular strictness for at least four reasons.

First, as has been seen, food, and information about food, has a major impact on consumers' health. The lesson

of Rodale Press" and the Cigarette Rule," *inter alia*, is that when advertising impacts health the Commission will hold the advertiser to a very high duty of care.

Second, because food has a tremendous impact on the average family budget and a powerfully regressive impact on the economic well being of the very poor, the potential scope of injury is unusually great."

Third, food advertising is often directed, at least in part, to especially susceptible audiences—children, the poor, the elderly—and must therefore be judged in the light of the ability of these audiences to deal with and understand the full implications of the advertising."

Fourth and finally, the food industry's history of massive and forceful advertising has given the industry tremendous influence in the market place over consumer purchase and use behavior. Possession of such power places an advertiser under a special duty of fair dealing towards consumers, especially since food products are so directly and intimately linked to consumers' health and economic well being."

To this point, the materiality of nutrition-related claims and information and standards applied in determining violations of sections 5 and 12, as defined by section 15, of the Federal Trade Commission Act have been discussed. In the light of the materiality of nutrition information and the application of the standards of deception of food advertising, it may be concluded that the failure to provide nutrition information in food advertising is a deceptive practice in violation of sections 5, 12, and 15 of the Federal Trade Commission Act."

"15 U.S.C. 55 (1970).

"Manco Watch Strap Co., Inc., 60 F.T.C. 495 (1962); Mohawk Refining Corp., 54 F.T.C. 1071, 1077 (1958). "The appeal also contends that no power is conferred under the act to require revealing statements in cases of nondisclosure unless the challenged practice also is accompanied by false statements or affirmative misrepresentation pertaining to the articles offered. This legal concept is erroneous. The Commission has plenary power to require affirmative disclosure of material facts in situations where seller silence results in deception of purchasers." [citations omitted], *aff'd*, Mohawk Refining 1959), cert. denied, 361 U.S. 814 (1959).

"Charles of the Ritz Distributor Corp. v. F.T.C., 143 F.2d 676, 680 (2d Cir. 1944).

"Manco Watch Strap Co., Inc., 60 F.T.C. 495, 508 (1962), speaking of a deceptive silence concerning a product's foreign origin: "Further, there is a wealth of testimony here that, in the absence of any disclosure of the country of origin on the packages containing the watch bands, many purchasers will—if, indeed, they think about it at all—assume that the bands were manufactured in the United States."; Stupell Enterprises, 67 F.T.C. 173, 187 (1965): "We merely apply to the facts here the well-established rule that where breakage is likely to occur in the normal use of the product, and the hazards of such breakage are not apparent or obvious, at least to many consumers, non-disclosure of such risk is deceptive and therefore unlawful . . . most consumers expect and assume, in the absence of some indication to the contrary, that a product marketed to the general public is safe for the use for which it is sold."

"Bantam Books, Inc. v. F.T.C., 275 F.2d 680 (2d Cir. 1960), cert. denied, 364 U.S. 819 (1960) [abridged or retitled paperback books].

"Kerran v. F.T.C., 265 F.2d 246 (10th Cir. 1959), cert. denied, sub nom. Double Eagle Refining Co. v. F.T.C., 361 U.S. 818 (1959) [re-refined oil].

"Stupell Enterprises, Inc., 67 F.T.C. 173 (1965) [goggles may fail to protect users' eyes from injury]; Fisher & DeRitis, 49 F.T.C. 77 (1952) [flammable sweaters].

"Aronberg v. F.T.C., 132 F.2d 165, 167 (7th Cir. 1942).

"While affirmative claims of the advertiser may be illegal if they have a capacity or tendency to deceive the "unthinking", the Commission may, as a proper exercise of its power both to define and to remedy deception and unfairness, require the disclosure of information which may well not be utilized by the "unthinking" but will be utilized by many other consumers. With respect to affirmative claims, it may be precisely the "unthinking" who are most in need of protection; with respect to the disclosure of information, it would be improper to deny information to the reasonable consumer—thereby allowing deception and unfairness to continue as to him—on the grounds that not all consumers will be able to use or be interested in using the information.

"Rhodes Pharmacal Co. v. F.T.C., 208 F.2d 382, 387 (7th Cir. 1953), modified on other grounds, 348 U.S. 940 (1955).

"Trade Regulation Rule: Care Labeling of Textile Wearing Apparel 22-23 (1972). [Hereinafter cited as the "Care Labeling Rule"] 36 FR 23889. Trade Regulation Rule Respecting Failure to Disclose the Lethal Effects of Inhaling Quick-Freeze Aerosol Spray Products Used for Frosting Cocktail Glasses, 16 CFR 417, 34 FR 2417, 4 CCH Trade Reg. Reporter par. 38,022 (1969); Trade Regulation Rule Respecting Failure to Disclose that Skin Irritation May Result From Washing or Handling Glass Fiber Curtain and Draperies and Glass Fiber Curtain and Drapery Fabrics, 16 CFR 413, 32 FR 11023, 4 CCH Trade Reg. Rptr. par. 38,019 (1967); Trade Regulation Rule Respecting Deceptive Use of "Leak-proof," "Guaranteed Leak-proof," etc., as Descriptive of Dry Cell Batteries, 16 CFR 403, 29 FR 6535, 6536, 4 CCH Trade Reg. Reporter par. 38,014 (1964).

"Rodale Press, Inc., 71 F.T.C. 1184, 1239, 1241 (1967), vacated and remanded on other grounds, Rodale Press v. F.T.C., 407 F.2d 1252 (D.C. Cir. 1968).

"Trade Regulation Rule For The Prevention Of Unfair or Deceptive Advertising And Labeling Of Cigarettes In Relation To The Health Hazards Of Smoking And Accompanying Statement Of Basis and Purpose Of Rule 93-94 (1964). 29 FR 8353-8354 [Hereinafter cited as "Cigarette Rule"] ["the seller of a product whose use may cause personal injury is held to a more stringent standard of truthfulness in advertising than other sellers. As to this, the Commission not only may, but must, insist upon the most literal truthfulness" (Moretrench Corp. v. F.T.C., 127 F.2d 792, 795 (2d Cir. 1942)), and resolve all ambiguities and interpretive uncertainties against the seller."].

"See text at note 39, *supra*.

"S.S.S. Co. v. F.T.C., 416 F.2d 226, 228, 231 (6th Cir. 1969) [urban and rural poor]; Mather Hearing Aid Distributors, Inc., 78 F.T.C. 709, 734 (1971) [elderly]; Stupell Enterprises, Inc., 67 F.T.C. 173, 186-87 (1965) [children]; Personal Drug Co., 50 F.T.C. 828, 834 (1954); *aff'd* per curiam, sub nom. Savitch v. F.T.C., 218 F.2d 817 (2d Cir. 1955).

"This point is discussed more fully below in the text accompanying notes 95 to 99.

"As will be seen below, the provision of nutrition information in food advertising is a remedy not only necessary and appropriate to the violation just described but is also an appropriate partial or complete remedy to other acts and practices consisting of affirmative claims which are in themselves, quite apart from the deception just described, illegally deceptive.

In the statement of Basis and Purpose for the Care Labeling Rule, the Commission said:

"[I]t is deceptive not to reveal care instructions when silence on this subject can either mislead the public into using a care procedure which is harmful, or frustrate a basic assumption inherent in the initial purchase—that no special and costly maintenance will be required, and that the consumer will be able to distinguish between the whole range of possible care procedures and use the procedure which is both most effective and most economical."

This passage describes a violation of law to which the omission of care instructions is central. Consumers, basing their action on such data as the appearance of garments and the often ill-informed advice of cleaners and salespeople, often assumed that a given care procedure might be appropriate to a given garment when in fact the procedure would be inappropriate and damage the garment or, if not damaging to the garment, all the same unnecessarily expensive and, hence, uneconomical and injurious to the consumers. Although manufacturers of the garment did not always directly benefit from this type of consumer ignorance, and although some manufacturers might not engage in affirmative acts creating or enhancing consumers' confusion, other than by participating in the marketing of a variety of garments made with a variety of materials, many of them being artificial materials about which consumers and service personnel had little traditional knowledge, manufacturers of garments were held to be in violation of the Federal Trade Commission Act since their silence left undisturbed material and erroneous assumptions consumers were making concerning the proper post-purchase care of garments.

Very much the same considerations apply in the case of food advertising except that arguably food, even more than clothing, is of central importance to consumers' health and finances. To paraphrase the Care Labeling Rule:

It is deceptive not to reveal nutrition information when silence on this subject can either mislead the public into using food in their diet in a way which is nutritionally harmful or inadequate, or frustrate a basic assumption inherent in the initial purchase that the consumer will be able to distinguish between the whole range of nutrition values and characteristics of foods, and use those foods and daily patterns of consumption of foods which are most nutritionally effective and economical."

Just how silence on the subject of nutrition can mislead the public in the ways asserted above can be seen by considering the number of ways in which consumers can make erroneous assumption and decisions about food:

(1) A consumer may assume a given food plays a nutritionally valuable, or nutritionally harmless, role in his diet, when, in fact, given the particular circumstance of the consumer or the nutritional characteristic of the food this is untrue. An example would be a weight-conscious consumer purchasing

a food which is much higher in calories and lower in essential nutrients than the consumer assumes. Since the very act of unqualifiedly advertising a food to consumers represents the food as being appropriate for inclusion in the consumers' diets, this example illustrates, as do many of the following examples as well, a case coming within the definitions of section 15 of the Act requiring the disclosure of information material in the light of the consequences of use of the product.

(2) Consumers may assume that their choice of foods and their organization of foods into a diet does not have any particular significance for their health, when, to the contrary, good nutrition is necessary to good health.

(3) Consumers may assume that if they eat a reasonably varied diet, they need not have any conscious concern that they are receiving an adequate supply of all needed nutrients. But as shown above, some nutrients need be consumed daily and major segments of the population are short on one or more nutrients. Increasing consumers' knowledge about the actual value of the foods they consume will help correct this type of misbelief.

(4) Consumers may assume that most foods or a large number of foods of a certain type contain so large a number of nutrients in such significant amounts that consumption of these foods will adequately balance or help balance the diet, when in fact this is not true.

(5) In a related fashion, consumers may likewise erroneously assume that consumption of widely advertised foods, or foods with which they and their families have traditionally been familiar, or foods which may be similar to such familiar foods, may adequately insure a balanced diet.

(6) It may be assumed that certain foods contain a certain nutrient or are the best or only source of that nutrient when such is not the case. As cited above, survey evidence shows that consumers rely upon meat to satisfy their protein needs. Many may be unaware that less expensive foods can provide necessary protein."

(7) It may be assumed by consumers that their diet is deficient in some nutrients and that consequently food supplements, special foods, or increased consumption of certain foods is necessary when this simply is untrue. This misbelief and the misbelief cited under (6) take on added significance in light of the heavy and regressive burden food costs impose on the family budgets of the poor, for it is apparent that very substantial injury may flow from unnecessary food purchases. This same concern, and especially that the poor may be paying too much to obtain goods of adequate quality, was one basis for the Octane Rule."

(8) Consumers may assume that foods which resemble one another are comparable in their nutrients and calories when they are not. The difference in nutrients and calories among processed or imitation foods and the traditional foods they resemble and among closely related varieties of traditional foods can be very great and quite beyond the reasonable expectations of most consumers.

(9) Finally, a variety of affirmative representations are made in food advertising which, unqualified by nutrition disclosures, can be seriously misleading. An example would be an advertisement that emphasizes the unusually high content of one nutrient

in the advertised food but fails to disclose the unusually low content of all other nutrients.

These examples are not unrealistic, and it is evident that food advertising which fails to reveal nutrition information has the capacity or tendency to mislead many consumers in the manner indicated by the examples. As has been discussed above, the White House Conference found that the poor are often led by advertising into the misbelief that certain fortified foods are an adequate substitute for some nutritious foods or even whole meals, and the Commissioner of the Food and Drug Administration found that the increasing number of processed foods make it difficult for consumers to identify the nutritional qualities of foods." A Daniel Yankelovich survey found that in the absence of any information to the contrary from some authoritative source, consumers believe that heavily advertised name brands are good products and universally high in nutrient value."

Moreover, the audience for food advertising is nearly synonymous with the consumers of food and, therefore, nearly universal in its composition. Thus, it must of necessity include substantial numbers of consumers with only very modest intellectual, educational, and experiential skills. Given this audience and given the evidence of consumer malnutrition, of poor consumer food choices, and of the enormous variety of foods produced by modern technology, it is inevitable that the basic misbeliefs identified above, and many more misbeliefs besides, are widely held by large numbers of consumers in the audience for food advertising. The endless combinations in which nutrients and calories occur in foods make it all the more unavoidable, absent the provision of specific nutrition information, that large numbers of consumers will be misled to the detriment of their health and economic well being.

Moreover, the findings of the White House Conference Report and the nutrition studies starkly illustrate that ill-advised consumer food choices, in part attributable to the absence of nutrition information, are a major cause of malnutrition. Finally, the findings that consumers want nutrition information, and can use it correctly, all go to establish that information about the nutritional value of foods is highly material to the purchase and use behavior of many consumers. Moreover, these findings provide strong indications that the widespread and frequent disclosures of nutrition information in advertising would increase the number of consumers to whom such information is material.

In light of all the above considerations, it is apparent that it is deceptive under sections 5, 12, and 15 of the Federal Trade Commission Act not to reveal nutrition information in food advertising, since such information is material and could correct erroneous assumptions

" See text accompanying note 38, supra.

" See text accompanying note 40, supra.

" Trade Regulation Rule Including A Statement Of Its Basis And Purpose: Posting Of Minimum Octane Numbers On Gasoline Dispensing Pumps (1973). 36 FR 23878 [Hereinafter cited as the "Octane Rule"].

" See text accompanying note 4, supra.

" See text accompanying note 51, supra.

" Daniel Yankelovich, Incorporated, Effects Of Nutritional Labeling On Food Purchasing, prepared for Chain Store Age, (October, 1970).

" Care Labeling Rule, supra note 66, at 22-23, 36 FR 23829.

" Cf., Care Labeling Rule, supra note 66, at 22, 36 FR 23889.

concerning the nutritional value or lack of value of foods, assumptions which affect both the purchase of food and its use. This conclusion is strengthened by the recognition that food choices affect health; that food is a necessity and is regressive in its economic impact, taking a far higher share of low incomes than of middle and high ones; that the audience for food advertising is nearly universal and, therefore, includes many consumers of modest or low intellectual ability; and that the aggregate volume of food advertising creates a substantial degree of power over food choices; all of which, as argued earlier, make appropriate the imposition of particularly high standards in defining deception under sections 5, 12, and 15.

IV. THE FAILURE TO DISCLOSE NUTRITION INFORMATION IN ADVERTISING IS UNFAIR

The Courts have long recognized the Commission's broad authority to deal with unfair practices even though those practices are not deceptive, anticompetitive nor traditionally forbidden at common law.¹ Indeed, in deciding a case where respondent sought to limit the Commission's unfairness powers to matters of competitive injury, the Supreme Court likened the Commission to an equity court, saying:

[L]egislative and judicial authorities alike convince us that the Federal Trade Commission does not arrogate excessive power to itself if, in measuring a practice against the elusive, but congressionally mandated standard of fairness, it, like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws.²

Silence that unfairly harms the economic interests of consumers has with some frequency been the subject of Federal Trade Commission Trade Regulation Rules. From an examination of four such rules—Care Labeling,³ Octane,⁴ Incandescent Lamps,⁵ and Cigarettes⁶—the factors which may move the Commission to find unfairness in the failure to disclose information may be readily identified.

The Care Labeling Rule dealt with the needs of consumers who, faced with an enormous variety of clothing and fabrics, including many products made by non-traditional processes and/or from non-traditional materials, could not determine how to provide proper and economical care for the clothing they purchased,⁷ and could not comparison shop on the basis of economy of care.⁸ The

Commission found that under these circumstances care disclosures were required because "it is unduly oppressive and unfair to consumers to withhold information essential to the ordinary use of products."⁹

The Octane Rule likewise began with findings that consumers needed essential product information. In this instance, consumers faced a great variety of grades and brands of gasoline, and, absent octane disclosures, they could neither relate gasoline varieties to their automobile requirements so as to avoid engine damage nor price shop for gasoline.¹⁰ Lacking octane information, consumers often purchased gasoline of higher expense and octane quality than their automobiles required.¹¹ Again, the Commission found that, under the circumstances, failure to disclose octane values was an unfair trade practice and so ordered their disclosure.¹²

Although the Statement of Basis and Purpose for the Incandescent Lamps Rule did not expressly invoke the statutory term "unfair," that Rule also dealt with a case where consumers, lacking basic product information, could not relate available products to their preferences and needs.¹³

At issue in these three rules was the ability of consumers to make basic determinations concerning the product and its value, the specific uses for which it is suited, its specific relation to the consumers' particular preferences or needs, or basic considerations involved in its proper use such as the care appropriate to it. Unfairness may thus arise when, due to the absence of information about the nature of the product, consumers cannot make these types of basic determinations concerning the product.

As the preceding sections of this Statement have shown, nutrition information is material to consumer use and purchase behavior, and, absent nutrition information, consumers cannot make basic determinations concerning food products. These facts alone are sufficient to establish the unfairness of withholding nutrition information in food advertising. Indeed, insofar as injury or the risk of injury to consumers is an important component of unfairness, the withholding of nutrition information in food advertising presents a more compelling instance of unfairness than was present in the rules which have been discussed. The individual losses associated with the purchase of unnecessarily expensive gasoline, or a lightbulb too dim or too short lived, did not, unlike unwise food choices, affect health at all.

The Commission has recognized that a special duty of fair dealing is particularly appropriate where the advertised

product involves danger to human health.¹⁴ While nutritionally unwise food choices do not ordinarily pose an imminent danger to health, they quite clearly do affect health adversely if they are habitual.

Particularly because food bears upon health, is a necessity and is a major item in the ordinary consumer's budget, the staff concludes that it is an unfair practice in violation of section 5 of the Federal Trade Commission Act to fail to disclose in food advertising nutrition information which is of importance in making basic determinations about the advertised food. With respect to such acts or practices which impair consumers "freedom to choose among available products," the Commission has "a broad mandate to proscribe."¹⁵

Several additional considerations support the conclusion that the failure to disclose nutrition information in food advertising is an unfair practice under section 5. In the Statement of Basis and Purpose for the Cigarette Labeling and Advertising Rule, the Commission recognized that modern mass media advertising on a vast scale

... is a form of power in the market place—power over the buying choice of consumers. It is lawful power. But just as the possession of lawfully-acquired market or monopoly power in the antitrust sense may nevertheless place a firm under a special duty of fair dealing toward its competitors, an advertiser's possession of great power vis-a-vis consumers may place him under a special duty of fair dealing toward them ... [citations omitted].¹⁶

As previously noted, the food industry spends more than 800 million dollars a year in advertising; no industry spends more. These facts alone make appropriate the recognition of a special duty of fair dealing even apart from the fact that the products involved relate directly to health.

Far from emphasizing even nutrition in general, however, let alone brand-specific nutrition information, food advertising "(c)onsidered as a whole ... has emphatically and persistently driven home, in the minds of its vast audience, the pleasure and desirability" of the advertised food wholly apart from considerations of nutrition.¹⁷ In the Cigarette Rule, the Commission found that the cigarette industry's

... massive, continuous, mounting, and forceful advertising, coupled with the refusal to acknowledge or take any steps to inform the consuming public of the hazards to health, has blunted public awareness and appreciation of these hazards and has tended

¹ See, *P.T.C. v. R. F. Keppel & Bros., Inc.*, 201 U.S. 304 (1934).

² *P.T.C. v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972).

³ Care Labeling Rule, supra, note 66, 36 FR 23893.

⁴ Octane Rule, supra, note 77, 36 FR 23871.

⁵ Trade Regulation Rule Relating to Incandescent Lamps (Light Bulbs) (1971), 36 FR 11784. [Hereinafter cited as "Lamp Rule."]

⁶ Cigarette Rule, supra, note 68, 29 FR 8324.

⁷ Care Labeling Rule, supra, note 66, at 7, 19, 24, 36 FR 23895, 23898, 23899.

⁸ Care Labeling Rule, supra, note 66, at 23, 24; 36 FR 23899.

⁹ Id.

¹⁰ Octane Rule, supra, note 77, at 8-23, 41-42; 36 FR 23873-23876, 23880.

¹¹ Octane Rule, supra, note 77, at 23-28, 43; 36 FR 23876-23877, 23881.

¹² Octane Rule, supra, note 77, at 39-40, 36 FR 23880.

¹³ Lamp Rule, supra, note 65, 36 FR 11784.

The Lamp Rule itself does state that the withholding of information required to be disclosed is not only a deceptive but also an unfair practice.

¹⁴ Cigarette Rule, supra, note 68, at 93-95, 29 FR 8353-8354. Cf., *Rodale Press, Inc.*, 71 F.T.C. 1184, 1239, 1241 (1967), vacated and remanded on other grounds, *Rodale Press, Inc. v. P.T.C.*, 407 F.2d 1252 (D.C. Cir. 1968); *Firestone Tire and Rubber Co.*, 81 F.T.C. 398, 451-482 (1972); as modified, Feb. 16, 1973, aff'd, 481 F.2d 246 (6th Cir. 1973), cert. denied, 414 U.S. 1112 (1973).

¹⁵ Cigarette Rule, supra, note 68, at 104, 29 FR 8357.

¹⁶ Cigarette Rule, supra, note 68, at 105, 29 FR 8357.

¹⁷ Cigarette Rule, supra, note 68, at 104-105, 29 FR 8357.

to maintain demand for the product in the face of growing public concern.¹²²

Similarly, food advertising taken as a whole has tended to blunt public awareness of the health significance of food choices and to encourage patterns of consumption which are contributing to a decline in the nutritional status of major segments of the population.

These considerations relating to unfairness are given yet greater force by the nutrient labeling rules of the Food and Drug Administration.¹²³ Those rules require as a matter of law that nutrient information appear on the labeling of many types of foods. They do so, moreover, not simply under a general public interest standard, but, rather, under the misbranding provisions of the Food, Drug and Cosmetic Act. The importance of nutrition and nutrition information relating to specific brands has, therefore, already moved (unlike the issue of the health impact of smoking at the time of the Cigarette Rule) out of the realm of mere public concern to the status of a duty imposed by law. Advertising with the capacity or tendency to contradict nutrient labeling information, or to reduce the likelihood that it will be utilized, or to dilute its impact, is for that reason unfair under section 5. The relationship of food labeling and advertising will be discussed below in the Remedy section of this Statement. It will be seen that the failure to disclose nutrition information in food advertising can have just these effects.

For these reasons, the staff concludes that food advertising is unfair under section 5 of the Federal Trade Commission Act if it fails to disclose nutrition information relating to the advertised food. That failure makes it difficult for a consumer to reach basic determinations concerning food, tends to inhibit appreciation of the importance of nutrition, and causes injury both to health and to the pocketbook.

V. THE CHOICE OF REMEDY

It has been established in the preceding discussion that, because of deception and unfairness in advertising linked directly to both misleading representations and the failure to disclose relevant and material nutrition information about foods, consumers are unable at present to assess properly the nutritional value of many foods and to select the foods which they will purchase on the basis of such values. The question therefore arises as to how to provide such information to consumers so as to eliminate this deception and unfairness. As the Commission stated in the Cigarette Rule:

Whether the ill effects of deceptive non-disclosure can be cured by a disclosure requirement limited to labeling, or whether a further requirement of disclosure in advertising should be imposed, is essentially a question of remedy. As such it is a matter within the sound discretion of the Commission. The question of whether in a particular case to require disclosure in adver-

tising cannot be answered by application of any hard and fast principle. The test is simple and pragmatic: Is it likely that, unless such disclosure is made, a substantial body of consumers will be misled to their detriment?¹²⁴

As a general proposition, since consumers are injured as a result of the deceptive and unfair non-disclosure of nutrition information in advertising, disclosure of some form of nutrition information in advertising would appear to be reasonably related to these violations and a means of avoiding such injury. The nature and extent of such disclosure involves resolution of numerous issues of fact. There is a general issue of policy, however, we wish to address prior to the receipt of public comment. That issue is whether the existence of FDA's nutrient labeling program eliminates the necessity for any disclosures in food advertising.

At the outset, it should be noted that not all foods will carry nutrient labels.¹²⁵ As to foods which do contain nutrient labels, it presently appears to the staff to be not only reasonable but necessary that the advertising for such foods also disclose nutrition information.

The existence of nutrient labeling is itself an affirmative reason in support of advertising disclosure. Without advertising disclosure, massive food advertising may well undermine or even defeat the intended purpose of nutrient labels. Massive food advertising which avoids the subject of brand-specific nutrition information—and instead attempts to sell food products solely for such factors as taste, appearance, and association with social pleasures—has the capacity or tendency to obscure the importance of nutrition and to reduce the importance or relevance of nutrient labels to consumers. It is highly pertinent to this point that the architects of the nutrient labeling program at FDA do not view that program as a panacea for problems of malnutrition but see other steps, including information in advertising, as necessary adjuncts to the elimination of ignorance and deception. For example, Doctor Charles C. Edwards, Assistant Secretary for Health, has stated:

In my opinion, the nutritional labeling program is a remarkably important accomplishment . . .

But I don't want to overestimate the importance of what we have managed to do so far.

I will tell you flatly that this achievement will amount to nothing if we, as a nation, fail to complete the work that has been started.

What I am saying is that the products have to change, and so does the way they are presented to the American people.

Certainly, the primary function of food advertising is to get people to buy the product. But the way to do that, in my judgment, will be to present the public full and accurate information on what that product

¹²² Cigarette Rule, supra, note 68 at 89-90, 29 FR 8352. (footnotes omitted)

¹²³ The foods that will be covered by general nutrient labels are, with certain limited exceptions, those that contain any added vitamins, minerals, or protein, or whose labeling or advertising contains claims or information concerning nutrition.

has to offer in the way of nutritional content.¹²⁶

Similarly, as noted earlier, a study on the effects of nutrient labeling on food purchasing found that, in the absence of information to the contrary from an authoritative source, consumers believe that heavily advertised name brands are good products, high in nutrient value.¹²⁷ This assumption can vitiate the impact of nutrient labeling on many prospective purchasers and thus decrease its effectiveness.

Beyond simply maintaining the integrity of the FDA nutrient labeling program, nutrition disclosures in advertising can complement the label and increase its use, thereby substantially increasing the ability of consumers to obtain more nutritious food as part of their diets. It is particularly reasonable to complement nutrient labeling in view of the number of persons either malnourished or at risk of malnourishment, and in view of rapidly rising food prices that increase the utility to consumers of information about comparative nutrition values.¹²⁸

Advertising is a powerful force for increasing the awareness of nutrition and for making nutrition a factor, along with others, to be regularly taken into account in food choices. By making nutrition more salient, the use of nutrition labels should be increased.

Moreover, food choices are often made before the consumer arrives at the supermarket and, therefore, before the label is seen. Advertising is an important part of this selection process. It is, indeed, the very purpose of advertising to induce a decision to purchase prior to actual shopping. By introducing information about nutrition at a stage in the selection process prior to actual shopping, advertising disclosures will provide an important complement to labeling, for example, by reducing the instances in which purchase decisions formed by advertising would have to be remade at the point of purchase through use of the label.

Therefore, the staff believes it is essential to the elimination of deception and unfairness in food advertising that nutrition information concerning advertised foods be required to be included in some form in virtually all food advertising, not merely that which makes explicit nutrition claims of the sort governed by Subpart B of the Commission's proposed rule.

¹²⁴ Address by Charles C. Edwards, M.D., "Nutritional Labeling And Public Health," delivered before the Family Health Annual Awards Luncheon, New York, October 9, 1973. [Italic added.]

¹²⁵ "Effects Of Nutritional Labeling On Food Purchasing," supra note 80 at 16.

¹²⁶ In addition to bearing upon the prevention of deception and unfairness, considerations of public policy directly involving nutrition are in themselves relevant to fashioning a remedy. The Supreme Court long ago recognized the "importance of taking fair account, in a civilized legal system, of every socially desirable factor in the final judgment . . ." Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 197 (1941) (per Frankfurter, J.) (requiring NLRB to take account, in fashioning a back pay order, of "the healthy policy of promoting production and employment" 313 U.S. at 200).

¹²⁷ Cigarette Rule, supra, note 68, at 105, 29 FR 8367.

¹²⁸ See, inter alia, 21 CFR 1.8, 1.17 1.18, Part 125. (1973).

The following is the text of a staff proposal for achieving the affirmative disclosure of nutrition information in food advertising as to which the Commission wishes to elicit comments. However, neither the Commission nor the Bureau Director or the Assistant Director for National Advertising is presently prepared to propose the following provisions as part of the rule.

AFFIRMATIVE DISCLOSURE

SECTION 1—FOODS WITH NUTRIENT LABELS

If a food contains an added nutrient (except as provided in 21 CFR 1.17(h)), or if any nutrition claim or information respecting nutrition is made on the label, in labeling, or in advertising, or if its label or labeling is subject to the requirements of 21 CFR 1.17, an advertisement for such food shall clearly and conspicuously disclose the following information:

a. In the video portion of any television advertisement 30 seconds or less in length, for a minimum of six (6) seconds, the identities of at least four (4) of the following eight (8) nutrients using the following common or usual names: Protein, Vitamin A, Vitamin C, Thiamine, Riboflavin, Niacin, Calcium and Iron, which are present in a serving in amounts of 10 percent or more of the U.S. RDA (or, if the food contains less than four (4) such nutrients, each nutrient present in said amount), as well as the percentage of the U.S. RDA of each such nutrient and the number of calories contained in a stated serving.

1. Alternatively, the video portion of any such advertisement shall clearly and conspicuously disclose, for a minimum of fifteen (15) seconds, the nutrition information which is required to appear on the principal display panel and information panel(s) of the food label (see 21 CFR 1.8d) in the standard format described in 21 CFR 1.17; *Provided, however*, That any nutrient present in a serving in an amount less than 2 percent of the U.S. RDA shall be indicated either by a zero or by a notation (without the use of any asterisk) that such nutrient is present in an amount of less than 2 percent of the U.S. RDA.

2. If the alternative disclosure set forth in the immediately preceding paragraph is not made and if the advertised food does not contain at least one nutrient in an amount of 10 percent or more of the U.S. RDA per serving, such advertisement shall clearly and conspicuously make the following specific disclosure simultaneously in the audio and video portions:

This food does not contain 10% or more of the U.S. RDA of any vitamin, mineral or protein.

3. Immediately upon the conclusion of disclosure of nutrient data in the label, or the simultaneous audio/video disclosure that the advertised food does not contain 10 percent or more of the U.S. RDA of any vitamin, mineral or protein, the audio portion of such advertisement shall clearly and conspicuously make the following specific disclosure:

Read the food label for more nutrition information.

b. In the video portion of any television advertisement greater than 30 seconds in length, for a minimum of twelve (12)

seconds, the identity and percentage of the U.S. RDA per stated serving of each of the following eight (8) nutrients using the following common or usual names: Protein, Vitamin A, Vitamin C, Thiamine, Riboflavin, Niacin, Calcium, and Iron, which is present in a serving in an amount of 10 percent or more of the U.S. RDA, as well as the number of calories per stated serving.

1. Alternatively, the video portion of any such advertisement shall clearly and conspicuously disclose, for a minimum of fifteen (15) seconds, the nutrition information which is required to appear on the principal display panel and information panel(s) of the food label (see 21 CFR 1.8d) in the standard format described in 21 CFR 1.17; *Provided, however*, That any nutrient present in an amount less than 2 percent of the U.S. RDA shall be indicated either by a zero or by a notation (without the use of any asterisk) that such nutrient is present in an amount of less than 2 percent of the U.S. RDA.

2. If the alternative disclosure set forth in the immediately preceding paragraph is not made, and if the advertised food does not contain at least one nutrient in an amount of 10 percent or more of the U.S. RDA per serving, such advertisement shall clearly and conspicuously make the following specific disclosure simultaneously in the audio and video portions:

This food does not contain 10% or more of the U.S. RDA of any vitamin, mineral or protein.

3. Simultaneously with the disclosure of nutrient data in the video portion, the audio portion of such advertisement shall clearly and conspicuously disclose the identities of at least four (4) of the nutrients disclosed in the video portion, as well as the percentage of the U.S. RDA of each such nutrient and the number of calories contained in a stated serving; and immediately upon the conclusion of such disclosure, or immediately upon the conclusion of the simultaneous audio/video disclosure in subparagraph (2) hereinabove (that the advertised food does not contain 10 percent or more of the U.S. RDA of any vitamin, mineral or protein), shall clearly and conspicuously make the following specific disclosure in the audio portion:

Read the food label for more nutrition information.

c. In any print advertisement (except one described in section 1(e) hereinbelow), the identity and percentage (including zero percent) of the U.S. RDA per stated serving of each of the eight (8) nutrients listed in sections 1(a) and 1(b) above, as well as the number of calories per stated serving.

1. Alternatively, such advertisement shall clearly and conspicuously disclose the nutrition information which is required to appear on the principal display panel and information panel(s) of the food label (see 21 CFR 1.8d) in the standard format described in 21 CFR 1.17.

d. In any radio advertisement, the following specific disclosure:

Read the food label for nutrition information.

e. In any billboard or other display advertisement (except one which is located in the interior of a public transit vehicle) normally viewed and read from a distance substantially greater than the normal range of reading distances for a book, newspaper, magazine or other similar printed reading matter, the following specific disclosure:

Read the food label for nutrition information.

SECTION 2—FOODS WITHOUT NUTRIENT LABELS

a. If a food is not subject to the provisions of section 1 hereinabove, an advertisement for such food shall clearly and conspicuously disclose the following information:

1. The number of calories per stated serving; and

2. Unless it is demonstrated that relevant analytical data for the advertised food or, in the absence of such data, that relevant analytical data for the specific kind of advertised food indicate that a serving of food contains at least one nutrient in an amount of 10 percent or more of the U.S. RDA, the following specific disclosure:

This food does not contain 10% or more of the U.S. RDA of any vitamin, mineral or protein.

b. An advertisement which does not mention the distributor of a food or his brand(s) for fresh meat, fish or fowl; or a fresh vegetable; or a fresh fruit; or fresh potatoes which food, apart from the disclosure hereinafter provided, would not be subject to the provisions of section 1 hereinabove, may clearly and conspicuously disclose the common or usual name (without any designation of the percentage of the U.S. RDA per serving) of any of the eight (8) nutrients listed in sections 1(a) and 1(b) hereinabove which, according to relevant analytical data for the specific kind of advertised food, is found in such food in an amount of 10 percent or more of the U.S. RDA per serving; *Provided, however*, That such advertisement shall not be required to disclose the number of calories per stated serving in compliance with section 2(a) hereinabove.

The preceding proposal concerning affirmative disclosure is intended to be subject to the provisions of Subpart A of the Commission's proposed rule concerning definitions and form, content and method of making disclosures. In addition, staff would propose adding or substituting certain provisions in Subpart A of the Commission's proposed rule, were the preceding proposal to be incorporated in the rule:

(To § 437.1(a), add the following as parts of the proposed definition of "advertisement":)

1. Add to the proposed last sentence, after the words "It does not include point-of-purchase advertising", the phrase:

except for a food covered by the provisions governing the advertising of "natural" or "organic" foods.

2. Add a new last sentence stating:

Advertising by restaurants which contains any claim covered by Subpart B of this rule shall comply fully with the provisions

therein, but shall be exempt from the provisions relating to affirmative disclosure.

(In place of the same lettered paragraphs and/or subparagraphs of § 437.2, substitute the following provisions:)

(a) *Nutrients.* (1) Except as otherwise specifically permitted under Section 1 of the provisions governing affirmative disclosure, any disclosure of a nutrient shall be made only from among the following nutrients (listed in descending order of percentage of the U.S. RDA per serving), using the following common or usual names: Protein, Vitamin A, Vitamin C, Thiamine, Riboflavin, Niacin, Calcium and Iron.

(1) In the video portion of an advertisement governed by section 1(a) of the provisions on affirmative disclosure which discloses the nutrient(s) contained at 10 percent or more of the U.S. RDA, or in the audio portion of an advertisement under section 1(b)(3) of those provisions, the nutrient(s) disclosed shall be the nutrient(s) contained in a serving of the advertised food at the highest percentage(s) of the U.S. RDA.

(1) An advertisement for a food may represent that such food contains the common or usual name of any additional nutrient listed under 21 CFR 1.17(c)(7)(iv) and 21 CFR 125.1(b) if there is full compliance with § 437.2(a)(2) of this rule.

(2) Except as specifically permitted by the alternative video disclosures (of label information) in sections 1(a)(1) and 1(b)(1) of the provisions governing affirmative disclosure, or by section 1(c) of those provisions (disclosure of label information), and except by use of the terms "enriched" or "fortified" as part of the common or usual name of a standardized food, a food shall not be represented in advertising (whether by any required disclosure or voluntary claim) as containing a nutrient, unless (1) the nutrient's (a) identity (expressed as the common or usual name) and (b) amount (stated as a percentage of the U.S. RDA contained in a stated serving of the advertised food) are clearly and conspicuously disclosed in accordance with all the provisions governing affirmative disclosure, and unless (2) a serving of such food contains the identified nutrient in an amount of 10 percent or more of the U.S. RDA. If a food or serving thereof is required to contain any nutrient at a certain percentage of the U.S. RDA before either a voluntary claim may be made (see Subpart B) or a disclosure is required under the provisions governing affirmative disclosure, the actual percentage (prior to any rounding off) of the U.S. RDA at which any such nutrient is contained in the advertised food or a serving thereof shall determine whether the condition(s) for making the claim or disclosing nutrient content has (have) been satisfied.

(b) *Protein.*

(2) Representations in advertising of the presence of protein may be made only if a serving of the advertised food contains protein at a level of 10 percent or more of the U.S. RDA and the total protein in the advertised food alone has a PER of 20 percent or more of the PER of casein.

(g) *Television advertisements—method and form of disclosures.* Under § 437.2(a) and (b) and Subpart B of this rule, any disclosure in any television advertisement shall be made clearly and conspicuously in the same portion (audio or video) of the advertisement in which the voluntary claim is made, and in immediate conjunction with and at least as clear and conspicuous as the voluntary claim which creates the requirement for such disclosure. Under the provisions governing affirmative disclosure, except as specifically provided otherwise (see sec-

tion 1 of those provisions), any disclosure in any television advertisement shall be made simultaneously in the audio and video portions of the advertisement. The video portion of any disclosure in any television advertisement shall be prominently displayed in the form of a super or title, or prominently displayed on the screen by itself (except that in television advertisements covered by the provisions governing affirmative disclosure which are greater than 30 seconds in length the relevant nutrition information shall always be prominently displayed on the screen by itself, simultaneously with the required audio disclosure) so as to enable it to be completely and easily seen and read (see section 1 for certain specific requirements) on all television sets, regardless of picture tube size, that are commonly available for purchase by the consuming public.

(h) *Print advertisements—method and form of disclosures.* (1) Under § 437.2 (a) and (b) and Subpart B of this rule, any disclosure in any print or display advertisement shall be made clearly and conspicuously, either in immediate conjunction with and at least as clear and conspicuous as the voluntary claim which creates the requirement for such disclosure, or prominently displayed by itself in any sans serif type style consistent with the requirements set forth in § 437.1(g)(1) of this rule and hereinbelow, but in no event in condensed type. Under the provisions governing affirmative disclosure, any disclosure in any print or display advertisement shall always be prominently displayed by itself in any sans serif type style consistent with the requirements set forth in § 437.1(g)(1) of this rule and hereinbelow, but in no event in condensed type. Under any provision of this rule, where a disclosure is prominently displayed by itself (i.e., not in immediate conjunction with the voluntary claim) the type shall be set on a slug at least one point larger than the point size of the type (not solid), using only normal word and letter spacing. In the case of advertisements within the provisions of section 1(e) of the provisions governing affirmative disclosure, the complete disclosure shall be displayed in capital letters. A determination of whether a particular disclosure is "clear and conspicuous" within the definition set forth under § 437.1(g)(1) of this rule shall be made by examining the context of the total advertisement, but in no event shall a disclosure be deemed clear or conspicuous unless it appears in type of at least the following sizes, size being measured by the height of the smallest letter employed in making the disclosure.

(i) For any disclosure required by section 2, ¹⁰⁶ at least $\frac{3}{32}$ inch type; for all other disclosures, at least $\frac{1}{16}$ inch type, in advertisements of a trim size not larger than 65 square inches.

(ii) For any disclosure required by section 2, ¹⁰⁶ at least $\frac{1}{8}$ inch type, for all other disclosures, at least $\frac{1}{16}$ inch type, in advertisements of a trim size larger than 65 square inches, but not larger than 110 square inches.

(iii) For any disclosure required by section 2, ¹⁰⁶ at least $\frac{3}{32}$ inch type; for all other disclosures, at least $\frac{1}{16}$ inch type, in advertisements of a trim size larger than 110 square inches, but not larger than 180 square inches.

(iv) In advertisements of a trim size larger than 180 square inches subject to section 1(c) or 1(c)(1): For any disclosure required by section 2, ¹⁰⁶ type of at least a size bearing the same proportion to the size of the advertisement as the proportion of $\frac{3}{32}$ to 180 square

inches; for all other disclosures, at least type of a size bearing the same proportion to the size of the advertisement as the proportion of $\frac{1}{16}$ to 180 square inches.

(v) For all disclosures, at least $\frac{1}{16}$ inch type, in advertisements subject to section 1(e) ¹⁰⁶ of a trim size larger than 180 square inches, but not larger than 270 square inches.

(vi) For all disclosures, at least $\frac{1}{8}$ inch type, in advertisements subject to section 1(e) ¹⁰⁶ of a trim size larger than 270 square inches, but not larger than 1500 square inches.

(vii) For all disclosures, a size of at least one inch per 3000 square inches times the area of the advertisement expressed in square inches [i.e., size = (1 inch/3000 square inches) × (area of the advertisement in square inches)], but in no event of a size less than $\frac{1}{16}$ inch, in advertisements subject to section 1(c) ¹⁰⁶ of a trim size larger than 1500 square inches.

(To § 437.2(h) add the following two provisions between proposed subparagraphs (2) and (3), renumbering the succeeding proposed subparagraphs as (5), (6) and (7)).

(1) If an advertisement occupies part of two or more pages, any disclosure required by the provisions governing affirmative disclosure shall appear on that page which contains the greatest part of the advertisement. Where the largest portions of an advertisement appearing on more than one page are equal in size, any disclosure required by those provisions shall appear on the first page occupied by the first of the largest portions of the advertisements.

(2) Any disclosure required by any provision governing affirmative disclosure shall be sufficiently separated from the text consistent with the manner described hereinbelow so that it can be easily read and understood by the casual observer or reader, and shall be printed in black against a solid white background and shall not be contained as an integral part of any specific pictorial design or illustration. Any such disclosure shall appear within a prominently ruled square or rectangle headed in capital letters "NUTRITION INFORMATION PER SERVING".

Further, the disclosure required by section 1(c) of the provisions governing affirmative disclosure shall be made in the form of a table containing the following items in the following order, with each item placed beneath the preceding item: (1) The heading, as required above, in capital letters stating "NUTRITION INFORMATION PER SERVING"; (2) serving size expressed as "serving size [size]"; (3) calories per serving expressed as "calories per serving [number]"; (4) a heading stating in capital letters "PERCENTAGE OF U.S. RECOMMENDED DAILY ALLOWANCES (U.S. RDA)"; and (v) the identity and percentage (including zero percent) of the U.S. RDA per stated serving of each of the eight (8) nutrients listed in section 1(a) of the provisions governing affirmative disclosure [nutrients], in descending order of percentage of the U.S. RDA per serving, ¹⁰⁸ with the nutrients being set forth in parallel columns, one column listing the nutrients and the other listing the corresponding percentages of the U.S. RDA at which each is present in a serving of the advertised food.

¹⁰⁶ Id.

¹⁰⁷ Id.

¹⁰⁸ Id.

¹⁰⁹ See substitute § 437.2(a)(1) set forth above in connection with the preceding proposal on affirmative disclosure.

¹⁰⁶ These sections refer to the provisions governing affirmative disclosure.

¹⁰⁷ Id.

¹⁰⁸ Id.

¹⁰⁹ Id.

NOTICES

Below are (vi) an example of the format specified for disclosures required by section 1(c) of the provisions governing affirmative disclosure; and (vii) an example of the format specified for disclosures required, as appropriate, by sections 2(a) (1) and (2) of those provisions. The examples are intended only to illustrate the required format, and in no way should be construed to represent actual type size or style.

(a)

NUTRITION INFORMATION PER SERVING

Serving size (ounces)-----	8
Calories per serving-----	210
PERCENTAGE OF U.S. RECOMMENDED DAILY ALLOWANCES (U.S. RDA)	
Vitamin A-----	20
Vitamin C-----	15
Niacin-----	10
Riboflavin-----	10
Protein-----	6
Iron-----	4
Calcium-----	2
Thiamine-----	0

(b)

NUTRITION INFORMATION PER SERVING

210 calories per 6 oz. serving.

This food does not contain 10% or more of the U.S. RDA of any vitamin, mineral or protein.

The following are specific provisions which staff would include in those sections of Subpart B of the proposed rule where the Commission is not presently prepared to propose particular provisions. The Commission wishes to elicit comment on these provisions.

§ 437.5—Natural and organic food claims.

(a) A food shall not be represented in advertising to be "natural" or a "natural food" or "naturally grown", or otherwise be depicted, designated or described by any term or demonstration of similar import. However, an advertisement may represent that a food does not contain any artificial or synthetic preservatives, flavors or colors, or any other

artificial or synthetic ingredients, if such is the fact.

(b) A food shall not be represented in advertising to be "organic" or an "organic food" or "organically grown", or otherwise be depicted, designated or described by any term or demonstration of similar import. However, an advertisement may represent that a food has not been grown with or subjected to pesticides or artificial fertilizers or artificial conditioners, if such is the fact.

(c) An advertisement for a food which makes any representation permitted under § 437.6 (a) and (b) hereinabove shall not further represent that such food is nutritionally superior to any other food(s) on the basis of such permitted representation.

§ 437.9—Fat, fatty acid and cholesterol content claims.

(a) An advertisement shall not contain any representation regarding the fat, fatty acid or cholesterol content of an advertised food, unless such food meets the criteria set forth in 21 CFR 1.18 and carries a nutrient label in compliance with that regulation. If such food meets the criteria set forth in 21 CFR 1.18 and carries a nutrient label in compliance with that Regulation, an advertisement may contain only those representations which are permitted under 21 CFR 1.18.

(b) An advertisement shall not contain any representation that consumption of an advertised food or a serving thereof will prevent, mitigate or cure, or in any way contribute to the prevention, mitigation or cure of, heart or artery disease or any attendant condition.

(c) An advertisement shall not represent that consumption of an advertised food or a serving thereof will not cause or help cause, or will not increase or help increase the likelihood or risk of, heart or artery disease or any attendant condition.

§ 437.10—Health and related claims.¹¹⁸

(a) An advertisement shall not contain a representation that:

¹¹⁸ See 21 CFR 1.17(l).

(1) A food, because of the presence or absence of certain vitamins and/or minerals, is adequate or effective in the prevention, cure, mitigation, or treatment of any disease or symptom.

(2) A balanced diet of ordinary foods cannot supply adequate amounts of nutrients.

(3) The lack of optimum nutritive quality of a food, by reason of the soil on which that food is grown, is or may be responsible for an inadequacy or deficiency in the quality of the daily diet.

(4) The storage, transportation, processing or cooking of a food is or may be responsible for an inadequacy or deficiency in the quality of the daily diet.

(5) A food possesses any dietary property when such property is of no significant value or need in human nutrition. Ingredients or products such as rutin, or other bioflavonoids, para-aminobenzoic acid, inositol and similar substances which have not been shown to be essential in human nutrition shall not be represented in any way which states or implies nutritional benefit. Ingredients or products of this type may be advertised as individual products or mixtures thereof; *Provided, however*, That the possibility of nutritional, dietary or therapeutic value is not stated or implied. Examples of false or misleading statements or implications are:

(i) Statements to the effect that their need or usefulness in human nutrition has not been established.

(ii) Statements which otherwise disclaim nutritional, dietary or therapeutic value.

(6) A natural vitamin in a food is superior to an added or synthetic vitamin, or that there is a difference between vitamins, naturally present and those that have been added.

(b) A food shall not be represented in advertising as a "health food" or as containing "health foods," or otherwise be depicted, described or designated by any term or demonstration of similar import.

Issued: November 7, 1974.

[SEAL]

CHARLES A. TOBIN,
Secretary.

[FR Doc. 74-26141 Filed 11-8-74; 8:45 am]

Defendants' reply memorandum in support
of motion to dismiss

the confusion created by plaintiff's misplaced reliance.

Plaintiff's Argument

Plaintiff contends that it has a statutory right to cross-examination and rebuttal submissions during the rulemaking proceeding under 15 U.S.C. § 57a(c). This right, plaintiff contends, is also guaranteed by the due process clause of the United States Constitution. Plaintiff asserts that it is being deprived of its right to cross-examination and rebuttal by the size and scope of the record in the rulemaking proceeding.

Plaintiff also contends that "deferred" judicial review is not an adequate remedy. Moreover, plaintiff argues that "5 U.S.C. §704*, 15 U.S.C. §57a(c), and judicial precedent are not a bar to review by this Court."

Finally plaintiff urges that it will suffer irreparable injury if the relief it seeks is not granted.

* This statute was cited by plaintiff in support of its contentions. The language of the statute, standing alone, is sufficient to undermine plaintiff's contentions. Consequently plaintiff now finds itself in the unenviable position of rebutting the clear meaning of a statute it has invoked.

As will be demonstrated, limitations upon cross-examination and rebuttal are reviewable at the conclusion of the rule-making proceeding. Moreover, the rulings in the present case which are being challenged are not final and, therefore, not subject to judicial review. Finally, plaintiff does not have an absolute right to cross-examination and rebuttal submissions.

ARGUMENT

I

LIMITATIONS UPON CROSS-EXAMINATION AND REBUTTAL ARE TO BE REVIEWED AT THE CONCLUSION OF THE PRO- CEEDING

- a) The Act Specifically Provides For Review
of Rulings Effecting Cross-Examination
and/or Rebuttal

The Magnuson Moss Act (the "Act") embodies a specific procedure to remedy injuries resulting from a ruling limiting cross-examination or rebuttal testimony.

"(3) Upon the filing of the petition under paragraph (1) of this subsection,* the court shall have jurisdiction to review the rule in accordance with chapter 7 of Title 5 and to grant appropriate relief, including interim relief, as provided in such chapter. The court shall hold unlawful and set aside the rule on any ground specified in subparagraphs (A), (B), (C), or (D) of section 706(2) of Title 5 (taking due account of the rule of prejudicial error), or if -

* * *

* Reference is to petition in Court of Appeals.

- (b) the court finds that -
 (i) a Commission determination under subsection (c) of this section that the petitioner is not entitled to conduct cross-examination or make rebuttal submissions, or
 (ii) a Commission rule or ruling under subsection (c) of this section limiting the petitioner's cross-examination or rebuttal submissions,
has precluded disclosure of disputed material facts which was necessary for fair determination by the Commission of the rulemaking proceeding taken as a whole..." 57 a(e)(3)(B)

Pursuant to this statutory authority the Commission has issued rules governing rulemaking proceedings that appear in its Rules of Practice and Procedure (16 C.F.R. §1.11 et seq.) (a copy of which is attached for the convenience of the Court). The rules provide for the appointment of a Presiding Officer to conduct the rulemaking proceeding (16 C.F.R. §1.13(c)) and delegate to him the power, inter alia, to:

make rules and rulings limiting the representation of interested persons for the purposes of examination, including cross-examination, and governing the manner in which such examination is to be limited, including the selection of a representative from among a group of persons with the same or similar interests (16 C.F.R. §1.13(c)(1)(v)).

The rule also provides that:

The Presiding Officer shall conduct or allow to be conducted examination, including cross-examination of oral presentations and the presentation of rebuttal submission relevant to the issues, designated for consideration....
(emphasis added)

* * *

After consideration of the information supplied in response to the final notice, the presiding officer shall identify groups of persons with the same or similar interests in the proceedings. Such groups may be required to select a single representative for the purpose of examination, including cross-examination. If a group is unable to select a representative when the presiding officer may select a representative of each such group. (16 C.F.R. §1.13(d)(5)(D)(ii)).

After the close of the informal hearing the presiding officer is required to prepare a summary of the record, "both written and oral" and make initial factual findings and conclusions, which along with staff recommendation and public comment thereon, are transmitted to the Commission (16 C.F.R. §1.13(f-h)). Based on the entire record the Commission may issue, modify, or decline to issue a rule. Moreover, the Commission may withhold final action on the rule pending the receipt of additional information or additional views of interested persons if it deems it necessary.

The legislative history with respect to these provisions clearly establishes the exclusive nature of review of rulings connected with an individual's right to cross-examination and/or rebuttal submissions:

"The conference report provides for judicial review of final rules in appropriate U.S. Circuit Courts of Appeals. The venue for preenforcement review (whether under this subsection or under chapter 7 of title 5 of the United States Code) is exclusively vested in such courts. If a petitioner desires such review in accordance with the review standards

set forth in section 18(e)(3)(c), he must file a petition not later than sixty days after the rule is promulgated.

The conference report generally incorporates the standards for judicial review of rules under Section 706(2) of Title 5, United States Code (subject to certain exceptions discussed below)

Such a rule would also be set aside if the court found that any Commission action in excluding or limiting cross-examination or rebuttal submissions precluded disclosure of disputed material fact necessary for fair determination of the rulemaking proceeding, taken as a whole.

Section 18(c)(5)(c) provides that the only "substantial evidence rule" review of a section 18(a)(1)(B) rule which is available to a person challenging a rule is under section 18(e)(3)(A). Likewise, the only review of a Commission determination, rule, or ruling under section 18(c) limiting cross examination or rebuttal submissions would be under section 18(c)(3)(B). Thus, neither substantial evidence review nor review of limitations on cross examination and rebuttal submissions could be obtained in enforcement proceedings, or in a preenforcement judicial review action brought after the 60-day period specified in section 18(e)(1). In addition, section 706(2)(e) of title 5 United States Code, would not be applicable in any judicial review of such a rule, and section 706(2)(D) of such title would not be the basis of reviewing limitations on cross examination and rebuttal submissions.

The judicial review provisions in the bill specifically authorize the court to receive application from a petitioner or the Commission for permission to make additional oral or written presentations if there were reasonable grounds for failure to make such presentations in the proceedings before the Commission. Thus, a person who is contending in a review pro-

ceeding that any inability to engage in cross-examination or submit rebuttal information has resulted in unfairness may be able to cure any alleged unfairness by applying to the court to make additional presentations.

The judicial review provided for in section 18 is not exclusive. Such review, for example, could also be obtained under the provisions of chapter 7 of title 5 of the United States Code, subject to the limitations described above. For such review, the United States Courts of Appeals would be the exclusive forums of such review, except when it occurs in the course of an enforcement proceeding." S.Rept. No. 93-1408, 83d Cong., 2d Sess. 34-55 (1974) reprinted at 1974 U.S. Code Cong. & Admin. News p. 7755, 7766-7767. (Emphasis supplied)

As pointed out in defendants' initial memorandum, it has long been established that statutes providing for an exclusive mode of review carry with them a concomitant proscription on alternate modes of review, even in circumstances where such review might otherwise be appropriate. (Defendants' Original Memorandum, p. 8). Notwithstanding, fundamental principals of statutory construction, the legislative history leaves no doubt that Congress clearly intended review of rulings effecting cross-examination and rebuttal testimony to await final agency action before review by the appropriate forum.

II

EXHAUSTION SINE QUA NON TO
REVIEW OF PROCEDURAL RULINGa) Hearing Officer's Ruling Was
Not Final Agency Action

Plaintiff's strained and often labored argument does not alter the requirement of exhaustion. The Act provides that where a ruling has limited cross-examination, and where it is shown that such a ruling has precluded disclosure of disputed material facts necessary for fair determination in the rulemaking proceeding taken as a whole than the rule which results from the proceeding must be set aside and new proceeding commenced. This determination is not made, however, until completion of the proceeding. Plaintiff argues that the prescribed mode of review of such a ruling is not sufficient because it contemplates completion of the proceeding. Furthermore, plaintiff contends that the ruling is final because its request for Commission review was denied and the potential harm it will suffer is immediate. This proposition is refuted by the cases cited in plaintiff's memorandum in opposition to defendant's motion.

Abbott Laboratories v. Gardner 387 U.S. 136 (1967), is the leading Supreme Court case with respect to judicial intervention in an ongoing administrative proceeding. Defendant has in its initial memorandum explained the import of this case and adequately dis-

tinguished it from the present case. However, the Courts discussion of "finality" which was not discussed with particularity in the earlier memorandum is helpful in placing plaintiff's argument in context. The Court in Abbott specifically noted that "judicial intervention should only be considered where there is final agency action for which there is no other adequate remedy in Court." 136 U.S. at 140. The Court defined final agency action, as an action in which the agency promulgates a rule defined as an "agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." 136 U.S. at 149. In concluding that the action of the agency in that case was final the Court relied heavily upon the impact that the agency ruling would have on the injured party's day to day business affairs.*

This is also a case in which the impact of the regulations upon the petitioners is sufficiently direct and immediate as to render the issue appropriate for judicial review at this stage. These regulations purport to give an authoritative interpretation of a statutory provision that has a direct effect on the day-to-day business of all prescription drug companies; its promulgation puts petitioners in a dilemma that it was the very purpose of the

* It is interesting to note that Gardner v. Toilet Goods Assn. 387 U.S. 167 (1967) also cited by plaintiff and decided during the same Supreme Court term as Abbott, involved a similar analysis by the Court, but the Court found that the impact of the agency ruling was not as predictable and, therefore, would not support judicial intervention.

Declaratory Judgment Act to ameliorate." As the District Court found on the basis of uncontested allegations. "Either they must comply with the every time requirement and incur the costs of changing over their promotional material and labeling or they must follow their present course and risk prosecution." 228 F.Supp. 855, 861. The regulations are clear-cut, and were made effective immediately upon publication; as noted earlier the agency's counsel represented to the District Court that immediate compliance with their terms was expected. If petitioners wish to comply they must change all their labels, advertisements, and promotional materials; they must destroy stocks of printed matter; and they must invest heavily in new printing type and new supplies.

Plaintiff attempts to fit the facts of this case into that analysis. In its opposing memorandum, plaintiff states; inter alia:

"Plaintiff's dilemma is not unlike that in which Abbott Laboratories found itself, supra, pp. 15-16. If it goes ahead and does what the Commission says it must (in Abbott it was the Food and Drug Administration), it moots its own case and destroys any possibility of benefiting from the remedy which it should enjoy. If it proceeds under the assumption that its position is correct, only to have a court of appeals ultimately disagree with it, it runs the grave risk of having a final rule promulgated which contains provisions that may not have been supportable (or included) had plaintiff engaged in cross-examination or made rebuttal submissions based upon its analysis of the full rulemaking record - relevant and irrelevant. Damned if it does; damned if it doesn't. Only immediate review can obviate the potentiality of plaintiff's being a loser one way or the other." (opposing Memorandum, P. 28)

To cite the propositions should be sufficient to demonstrate its inappropriateness. Clearly the Court in Abbott was concerned about the direct impact of an agency ruling upon the day to day business affairs of the complaining party. Plaintiff's argument, in contrast, is addressed to the day to day conduct of litigation before an administrative body.

The Abbott case and its progeny were not intended to be employed where agency action was not final. Moreover, these cases have no application in circumstances where statute specifically provides for review of the challenged agency action. Hence, this Court should not interfere in an ongoing proceeding to decide procedural propriety, where such function has been entrusted to the Agency. In McKart v. United States,* 395 U.S. 185, 193-194 (1969, the Court stated:

Perhaps the most common application of the exhaustion doctrine is in cases where the relevant statute provides that certain administrative procedures shall be exclusive. See Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938) (National Labor Relations Act). The reasons for making such procedures exclusive, and for the judicial application of the exhaustion doctrine in cases where the statutory requirement of exclusivity is not so explicit, are not difficult to understand. A primary purpose is, of course, the avoidance of premature interruption of the administrative process. The agency, like a trial court, is created for the purpose of applying a statute in the first instance. Accordingly, it is normally desirable to let the agency develop the necessary factual background upon which decisions should be based. And since agency

* Cited by plaintiff at p. 17 of its memorandum.

decisions are frequently of a discretionary nature or frequently require expertise, the agency should be given the first chance to exercise that discretion or to apply that expertise. And of course it is generally more efficient for the administrative process to go forward without interruption than it is to permit the parties to seek aid from the courts at various intermediate stages. The very same reasons lie behind judicial rules sharply limiting interlocutory appeals.

Closely related to the above reasons is a notion peculiar to administrative law. The administrative agency is created as a separate entity and invested with certain powers and duties. The courts ordinarily should not interfere with an agency until it has completed its action, or else has clearly exceeded its jurisdiction. As Professor Jaffe puts it, "[t]he exhaustion doctrine is, therefore, an expression of executive and administrative autonomy." This reason is particularly pertinent where the function of the agency and the particular decision sought to be reviewed involve exercise of discretionary powers granted the agency by Congress, or require application of special expertise. [footnotes omitted.]

The exhaustion doctrine has been departed from in certain unusual cases where the agency action on its face has exceeded some important constitutional or statutory right and has resulted in irreparable injury cognizable as such in equity. Plaintiff's claims, however, that the rulings of the Presiding Officer will result in an expansive factual record, do not rise to this level.

To the contrary, they are on the level of rulings which the Supreme Court has said are governed by the exhaustion doctrine, since they involve discretionary determinations. Of equal importance is the fact that, if error is committed, plaintiffs will have an adequate remedy in the exclusive judicial review provided by statute.* Hence, they suffer no irreparable injury in being required to resort to the prescribed statutory judicial review. The expense that plaintiffs may be subjected to in participating in a rulemaking proceeding that may be later held to be defective on judicial review does not constitute irreparable injury. Renegotiation Board v. Bannerkraft Co., 415 U.S. 1, 24 (1974).

* In the extraordinary cases cited by plaintiff where courts have intervened in agency proceedings (e.g., Leedom v. Kyne, 358 U.S. 184 (1958); Elmo Division of Drive-X Co. v. Dixon, 348 F.2d 342 (D.C. Cir. 1965)) the reason for doing so has been that there was no adequate remedy to right the wrong complained of by the challenging party. They complain, however, only that the remedy is too far in the future. Such a complaint should be lodged with Congress, which vested exclusive preenforcement review in the court of appeals, not with this Court.

III

PLAINTIFF HAS NO ABSOLUTE RIGHT
TO CROSS EXAMINATION

While plaintiff cites Fay v. Douds, 172 F.2d 720 (2nd Cir. 1949) for the proposition that an "assertion of a constitutional right...not transparantly frivolous", invites judicial intervention in an ongoing administrative proceeding, plaintiff fails to cite a single scrap of authority to support its proposition that the subject rulings deprive it of a constitutional right. Plaintiff merely states that it is well established principal that, "denial of the right to cross-examination represents a violation of the constitutional right of due process." (Plaintiff's memroandum In Opposition, p. 14).

Plaintiff's constitutional argument is inappropriate for several reasons. First the legislative history of the Act evidences that Congress intended the Commission to have broad latitude in its regulation of cross-examination. Senator Moss' testimony with respect to Senatè fears that procedural requirements in the bill would "hamstring" the Commission as was true of other agencies under the Administrative Procedure Act clearly demonstrates Congress' intent with respect to the right to cross-examination.

"While there is a requirement that the Commission hold hearings at which interested persons may comment orally, the commission has expressly been given the authority and discretion to prescribe rules to avoid unnecessary costs or delays in those hearings. [120 Cong. Rec. S. 21976] (daily ed., Dec. 18, 1974)

Senator Moss proceeded to explain the limitations provided in the statute on the right to cross-examination noting that such procedures had been approved for use in administrative proceedings by the Court of Appeals for the District of Columbia in International Harvester v. Ruckelshouse 478 F.2d 615 (C.A.D.C.1973), and concluded by stating:

"These procedures will assure that rulemaking conducted by the Commission will be a far cry from the formal trial type procedures under sections 554 and 556 of the Administrative Procedure Act which have hamstrung other agencies, . . . The procedures should permit a fair airing of the views of all interested parties without unduly inhibiting the Commission's rule-making authority." [120 Cong. Dec. S. 21976] (daily ed., Dec. 18, 1974).

Congressman Broyhill also stated that these rights were not absolute. [120 Cong. Rec. H. 12348 (daily ed., Dec. 19, 1974)]. Under these circumstances it is abundantly clear that the absolute rights that plaintiffs claim were never introduced by Congress. Nor are such absolute rights in an administrative proceeding recognized by the federal courts.

International Harvester v. Ruckelshouse 478 F.2d. 615, supra was a case in which the Environmental Protection Agency made rules fixing automobile emission standards. The questions were important because automotive pollution was

to be 60% of air pollution and 80% in urban areas, while 28% of the nonfarm workforce draws its livelihood from the automobile industry and its products. Congress set a statutory standard but authorized the EPA to suspend it for one year on making specified findings. The EPA denied suspension, after a public hearing required by the statute. In addressing itself to an issue with respect to the absence of a general right of cross-examination, the Court stated:

"we do not think the absence of a general right of cross-examination on the part of the companies was a departure from 'basic considerations of fairness.'... The auto companies were allowed to submit written questions to the Hearing Panel to be asked to various witnesses...We do not think more was required....We distinguish between the assertion of a broad right of cross-examination, and a claim of a need for cross-examination of live witnesses on a subject of critical importance which could not be adequately ventilated under the general procedures." 478 F.2d at 630-631.

This view finds ample support in the case law from this circuit as well as many others. Indeed, the

prevailing view is that cross-examination need not be provided for by statute, or agency rules in connection with a rulemaking proceeding. See Burr v. New Rochelle Municipality Housing Authority 479 F.2d. 1165 (2d. Cir. 1973); Long Island Ry. Co. v. United States, 318 F. Supp. 490 (EDNY 1970). In Mobile Oil Co v. FPC, 483 F. 2d. 1238 (C.A.D.C. 1973), the Court set forth the requirements for a natural gas ratemaking proceeding.

"Some mechanism whereby adverse parties can test, criticize and illuminate the plans in the evidentiary basis being advanced regarding a particular point. The traditional method of doing this is cross-examination, but the Commission may find it appropriate to limit or even eliminate altogether oral cross-examination and rely upon written questions and responses." Id. p. 1263

The Act limits cross-examination to "disputed issues of material fact" which the Commission may determine it is necessary to resolve; moreover; the Act does not confer on any party an absolute right to conduct cross-examination. The Commission determines whether cross-examination is appropriate and the Commission may, if it so chooses, conduct it. Consequently, plaintiff's entire memorandum in opposition is based upon the patently incorrect assumption that it has an absolute right to cross-examination.

Apart from the fact the weight of authority establishes that plaintiff has no constitutional right to cross-examination, plaintiff's own version of the facts suggest that he can not establish a denial of such a right. At page 27 of the Memorandum in Opposition, plaintiff states:

"Plaintiff finds itself in the hazardous position of facing irreparable harm whether or not it attempts to wade through the mass of intermixed irrelevant and relevant documents now in the record. If plaintiff fails, prior to the hearings, to review and analyze the 45,000 documents in the record, it is exposed to the risk of having the content of some of those documents used against it without having prepared for that contingency. Alternatively, if plaintiff can and does analyze the entire record, it may deny itself, at great effort and expense, the relief to which it would otherwise be entitled, i.e., which is sought herein."

Implicit in this statement is the possibility that plaintiff can, indeed, examine the documents which it claims are too voluminous, and thereby obviate the need for this action. Apparently, as plaintiff suggests throughout its papers, the real motivation for this case is that plaintiff wishes to test the Commissions procedures in this Court, notwithstanding the absence of a real or even potential injury.

IV

CASES CITED BY PLAINTIFF
ARE NOT APPLICABLE TO THE
PRESENT FACTS

Plaintiff relies heavily upon Leedom v. Kyne, 358 U.S. 184 (1958) to support its proposition that immediate judicial intervention is justified in the present case. This reliance is misplaced. In Leedom the Court was sustaining intervention in a case in which the National Labor Relations Board had formulated a ruling which was specifically prohibited by the Section 9(b)(1) of the National Labor Relations Act. This case clearly does not involve an agency ruling prohibited by statutory mandate.

Plaintiff also cites Jewel Companies, Inc. v. Federal Trade Commission, 432 F.2d 1155 (7th Cir. 1970); Elmo Division of Drive-X Co. v. Dixon, 348 F.2d 342 (D.C. C.A. 1965). These cases are not relevant to the present case. In each of these cases adjudicatory proceedings had been commenced against plaintiff. Moreover, each of these cases involved circumstances in which the plaintiff had no opportunity to obtain effective judicial review at the conclusion of the administrative proceedings. See Lever Bros. Company v. FTC, 325 F. Supp. 371, 372-374 (S.D. Ma. 1971).

The remaining cases cited by plaintiff support the proposition that the judiciary has jurisdiction to intervene in an administrative proceeding where the agency's acts were contrary to a specific statutory mandate. Unfortunately, plaintiff has failed to establish that the Hearing Officer, in the present case, acted contrary to statutory mandate. More important, the prior discussion in this memorandum and that contained in the defendant's initial memorandum firmly support the opposite conclusion. Hence, the myriad of cases cited by plaintiff with respect to ultra virus agency action are inapposite to the facts before this Court.

CONCLUSION

It is respectfully submitted that plaintiff's motion for temporary relief should be denied and defendant's motion to dismiss should be in all respects granted.

Dated: New York, New York

October 6, 1976

Respectfully submitted,

ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York
Attorney for the United States
of America

GARY G. COOPER
Assistant United States Attorney

- Of Counsel -

Plaintiff's sur-reply memorandum in
opposition to motion to dismiss

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - -x

ASSOCIATION OF NATIONAL
ADVERTISERS, INC.,

Plaintiff,

76 CIV 3277 (JMC)

-against-

FEDERAL TRADE COMMISSION, CALVIN
J. COLLIER, Chairman, PAUL RAND
DIXON and ELIZABETH HANFORD DOLE,
Commissioners,

Defendants.

- - - - -x

PLAINTIFF'S SUR-REPLY
MEMORANDUM IN OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS

This memorandum seeks, in view of defendants' reply memorandum, to refocus the Court's attention on the issues presented by plaintiff's complaint and its motion for temporary relief, and to address certain misimpressions that may have been created by defendants' reply memorandum.

The gravamen of the complaint is defendants' obstruction of plaintiff's ability to pursue its rights of meaningful cross-examination and rebuttal during a

rulemaking proceeding by their flooding the rulemaking record with thousands of irrelevant documents, many of them concededly so, at the latest possible moment. Plaintiff is not complaining, as defendants would have the Court believe, about "the size and scope of the record in the rulemaking proceeding" (Defs. Reply Mem., p. 2) or that the Presiding Officer's rulings will result in "an expansive factual record" (Defs. Reply Mem., p. 12). Indeed, plaintiff already has disclaimed such a theory (Pl. Mem., p. 9). Plaintiff is complaining about the unfair and reckless manner in which the record has been compiled. (That plaintiff could devote an entire point in its memorandum (Point II, pp. 7-11) to the defendants' deluging the record with irrelevant documents at the eleventh hour, and then have the latter characterize plaintiff's grievance merely as one of size is somewhat amazing.)

At pages 3-7 of their reply memorandum, defendants attempt to pass off a section of the Magnuson/Moss Act as exclusive and jurisdictional whenever one's rights to cross-examination or rebuttal are involved. But even defendants acknowledge that the Act provides for relief only from "a ruling limiting cross-examination or rebuttal testimony"

(Defs. Reply Mem., p. 3; emphasis ours). Plaintiff has demonstrated at pages 23-24 of its memorandum that the section cited by defendants is operative only where the Commission has made a determination or rule or ruling disentitling a person from conducting cross-examination or from making rebuttal submissions, or limiting such rights. (See, particularly, footnote 16 of plaintiff's memorandum.)

Defendants, at pages 8-13 of their reply memorandum, try to reduce the Presiding Officer's rulings to something less than final agency action. Such an attempt is devoid of factual support. For a summary of the events that have occurred during the rulemaking proceeding, and which support, if not require, a finding of finality in the agency's action see Hafner Affidavit, ¶¶13, 17, 18; Items 4, 4a, 6, 7, 8, 9; Complaint, ¶¶ Eighth, Tenth, Eleventh, Twelfth, Thirteenth; and Pl. Mem., pp. 11 and 22. For an illustration of potential, direct impact to business, which defendants claim is lacking, see Hafner Affidavit, ¶¶20-24.

Defendants claim that plaintiff does not have a constitutional right to meaningful cross-examination. To support their contention they rely on selective portions

of legislative history and on various unrelated cases which, by defendants' own characterization, stand only for the proposition that in certain situations the right to cross-examination may be regulated.

That the right to meaningful cross-examination and rebuttal is vital and within the due process guarantee is not only recognized by the Act itself and by the Commission's own rules but seems apparent.

All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents, and to offer evidence in explanation and rebuttal. In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding

Interstate Commerce Commission v. Louisville & N.R. Co., 227 U.S. 88, 93 (1912). See also Morgan v. United States, 301 U.S. 1, 18-20 (1937).

Denial of the right of cross-examination ... [has] no more place in conduct of hearings by an administrative officer than in a court of law.

Automobiles Sales Co. v. Boles, 58 F. Supp. 469, 473 (N.D. Ohio 1944).

Such is indicated even in the very cases cited by defendants in their reply memorandum. Indeed, in two of those cases, the determinations of the administrative agencies involved were reversed for failure to accord basic procedural rights to the parties therein.

In International Harvester (Defs. Reply Mem., p. 15) the Court noted:

We revert to our observation that a right of cross-examination, consistent with time limitations, might well extend to particular cases of need, on critical points where the general procedure proved inadequate to probe "soft" and sensitive subjects and witnesses.

478 F.2d at 631.

Thus, in refusing to uphold the agency's actions and in remanding for further hearings, the Court ordered that opportunity be afforded for cross-examination.

Subsequently, in Mobil Oil Co. (Defs. Reply Mem., p. 17), in referring to the above decision, the Court stated:

We held these general policy questions to be inextricably bound up with relatively specific factual issues of the sort that ordinarily require testing by cross-examination and other adjudicative procedures.

483 F.2d at 1252-53.

In finding that the agency's procedures in Mobil Oil failed to conform to fundamental fairness and therefore reversing its determination, the Court held that the "procedures must provide some mechanism for interested parties to introduce adverse evidence and criticize evidence introduced by others." (At page 1258).

Similarly, in Burr (Defs. Reply Mem., p. 17), the Court held that due process requires at least the minimum procedural safeguards of the opportunity to make written objections and to offer rebuttal material before an agency could put rent increases into effect for municipal housing.

Finally, in Long Island Ry. (Defs. Reply Mem., p. 17), the Court stated that:

If, on examining the data, the Long Island had pointed to specifics on which it needed to cross-examine or present live rebuttal testimony and the Commission had declined to grant an oral hearing, we would have a different case.

318 F. Supp. at pp. 498-99.

Moreover, in contrast to the above cases, there is involved herein cumulative constraints of two constitutionally protected rights, free speech (the trade regulation rule concerns the advertising of food products) and

due process (the rights to meaningful cross-examination and rebuttal during a rulemaking proceeding). The Court must treat in this case not merely with procedural due process in the protection of a common law or statutory right, but in the defense of speech against abridgment.

The United States Supreme Court has held commercial advertising to be a protected form of speech, Bigelow v. Virginia, 421 U.S. 809 (1975); Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., U.S. , 96 S. Ct. 1817 (1976). The rule-making proceeding underlying this action involves precisely that, and affects the first amendment rights of advertisers of food products, and of plaintiff as the representative of many of them.

The Supreme Court also has held that where agency abridgment of a first amendment right is involved plenary judicial review is indispensable. Blount v. Rizzi, 400 U.S. 410 (1971). Adequate cross-examination is an inseparable component of plenary judicial process, and no such review can exist alongside a denial of meaningful cross-examination. A fortiori any contemplated abridgment of speech by FTC (such as is involved in its regulatory

proceeding at issue here) that is based upon agency-obstructed cross-examination, is abhorrent to the fifth amendment not merely in the ordinary ways, but with respect to its additional, and even more solemn role as an ancillary guardian of first amendment rights. Thus, unlike the authorities relied on by defendants, the within action intimately involves an interface of fifth amendment with first amendment rights, where the denial of one results in the violation of the other.

In any event, no case cited by defendants has gone so far as to deprive a person totally of meaningful cross-examination. No court has synonymized "regulation" with "deprivation".

Curiously, at page 17 of their memorandum defendants admit that the statute itself provides for cross-examination on "disputed issues of material fact". The Presiding Officer has designated plaintiff as a group representative (Pl. Mem., p. 5), specifically giving it the responsibility (and the additional right) to conduct meaningful cross-examination and rebuttal. Defendants apparently feel free to give with one hand (under statutory authority, 15 U.S.C. §57a(c)(3)(A)) while taking away with the other (under no authority).

Defendants' failure to refute plaintiff's claim to a statutory, apart from constitutional, right to meaningful cross-examination (Pl. Mem., Point I) and its corresponding right to immediate review of a violation thereof (Pl. Mem., pp. 12-13, especially discussion of Leedom v. Kyne) is not without its own significance.

Conclusion

Defendants' motion should in all respects be denied and temporary relief be granted to plaintiff.

Dated: New York, New York

October 11, 1976

Respectfully submitted,

WEIL, GUTTMAN & DAVIS

By

Robert L. Sherman
Robert L. Sherman
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(212) 687 - 8573

Of Counsel

Gilbert H. Weil
Robert L. Sherman

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

PAULA S. GREENSPAN, being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides at 10 Franklin Avenue, White Plains, New York, 10601.

On October 11, 1976 deponent served the within Plaintiff's Sur-Reply Memorandum In Opposition To Defendants' Motion To Dismiss upon Robert B. Fiske, U. S. Attorney, attorney for defendants in this action at 1 St. Andrews Plaza, New York, New York 10007 the address designated by said attorney for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

5/
Paula S. Greenspan

Sworn to before me on this 11th
day of October, 1976.

Notary Public

Plaintiff's Notice of Appeal and
undertaking for costs

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
ASSOCIATION OF NATIONAL ADVERTISERS, INC.,

Plaintiff,

- against -

FEDERAL TRADE COMMISSION, CALVIN J.
COLLIER, Chairman, PAUL RAND DIXON
and ELIZABETH HANFORD DOLE,

Defendants.
-----X

NOTICE OF APPEAL

76 Civ. 3277
(JMC)

S I R S :

PLEASE TAKE NOTICE that the Association of National Advertisers, Inc. hereby appeals to the United States Court of Appeals for the Second Circuit from the Order dated February 11, 1977 granting defendants' motion to dismiss the complaint. Said Order was entered in this Court on the 14th day of February, 1977.

Dated: New York, New York

March 30, 1977

Yours, etc.

WEIL, GUTTMAN & DAVIS

By

Robert L. Sherman

ROBERT L. SHERMAN

Attorneys for Plaintiff
60 East 42nd Street
New York, New York 10017
(212) 687-8573

TO:

ROBERT B. FICKE, JR.
United States Attorney,
Southern District of New York
through:
GARY G. COOPER
Assistant United States Attorney
Civil Division
1 St. Andrews Plaza
New York, New York 10007



FIREMAN'S FUND INSURANCE COMPANY
THE AMERICAN INSURANCE COMPANY
NATIONAL SURETY CORPORATION
ASSOCIATED INDEMNITY CORPORATION
AMERICAN AUTOMOBILE INSURANCE COMPANY

BOND NO. 2489032

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK IN THE SECOND CIRCUIT

ASSOCIATION OF NATIONAL ADVERTISERS,
INC.

Plaintiff

against

FEDERAL TRADE COMMISSION, CALVIN J.
COLLIER, CHAIRMAN, PAUL RAND DIXON
and ELIZABETH HANFORD DOLE,
COMMISSIONERS

Defendants

UNDERTAKING FOR COSTS ON APPEAL

76 CIV. 3277 JMC

KNOW ALL MEN BY THESE PRESENTS, that NATIONAL SURETY CORPORATION, having an office and place of business in the City
County and State of New York, is held and firmly bound unto the above named Defendants

in the sum of TWO HUNDRED FIFTY AND NO/100 (\$250.00) Dollars
for the payment of which, well and truly to be made, it binds itself, its successors and assigns firmly by these presents.

WHEREAS, on the 14th day of February 1977 an order

was entered in the above entitled proceeding;

AND the appellant Association of National Advertisers, Inc.

feeling aggrieved thereby, appeals to the UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION IS SUCH, That if the aforesaid order

is affirmed or modified by the appellate court or if the appeal is dismissed, the appellant

Association of National Advertisers, Inc.

will pay all costs which may be awarded against it on said appeal

DATED, New York, this 11th day of April 1977

NATIONAL SURETY CORPORATION

Robert Di Scala

Attorney-in-Fact

360274-NS-1-73

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-248a-

Plaintiff's Amended Notice of Appeal

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
ASSOCIATION OF NATIONAL ADVERTISERS, INC.,

Plaintiff, -

- against -

FEDERAL TRADE COMMISSION, CALVIN J.
COLLIER, Chairman, PAUL RAND DIXON
and ELIZABETH HANFORD DOLE,

Defendants.
-----X

AMENDED
NOTICE OF APPEAL

76 Civ. 3277
(JMC)

S I R S :

PLEASE TAKE NOTICE that the Association of National Advertisers, Inc. hereby appeals to the United States Court of Appeals for the Second Circuit from each and every part of the Order dated February 11, 1977. Said Order was entered in this Court on the 14th day of February, 1977.

Dated: New York, New York

April 4, 1977

Yours, etc.

WEIL, GUTTMAN & DAVIS

By Robert L. Sherman

ROBERT L. SHERMAN

Attorneys for Plaintiff

60 East 42nd Street

New York, New York 10017

(212) 687-8573

TO:

ROBERT B. FISKE, JR.
United States Attorney,
Southern District of New York
through:
GARY G. COOPER
Assistant United States Attorney
Civil Division
1 St. Andrews Plaza
New York, New York 10007

Plaintiff's second amended Notice of
Appeal, from Order entered February
14, 1977 and from judgment entered
February 16, 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
ASSOCIATION OF NATIONAL ADVERTISERS, INC.,

Plaintiff,

- against -

FEDERAL TRADE COMMISSION, CALVIN J.
COLLIER, Chairman, PAUL RAND DIXON
and ELIZABETH HANFORD DOLE,

Defendants.
-----X

SECOND AMENDED
NOTICE OF APPEAL

76 Civ. 3277
(JMC)

S I R S :

PLEASE TAKE NOTICE that the Association of National Advertisers, Inc. hereby appeals to the United States Court of Appeals for the Second Circuit from each and every part of the Order entered February 14, 1977 and from the judgment entered February 16, 1977.

Dated: New York, New York

April 12, 1977

Yours, etc.

WEIL, GUTTMAN & DAVIS

By

Robert L. Sherman
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Attorneys for Plaintiff
60 East 42nd Street
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(212) 687-8573

TO:

ROBERT B. FISKE, JR.
United States Attorney,
Southern District of New York
through:
GARY G. COOPER
Assistant United States Attorney
Civil Division
1 St. Andrews Plaza
New York, New York 10007

-250a-

BEST COPY AVAILABLE

Service of three ③ copies of the within JOINT APPENDIX
is admitted this 12th day of May 1977

ATTORNEY FOR DEFENDANTS-APPELLEES

Robert B. Fiske, Jr. (F.L.)

COPIES RECEIVED

5/12/77

UNITED STATES ATTORNEY